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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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QUESTION PRESENTED

Whether, at the time of Mississippi's statehood in 1817, the lands under the non-navigable but tidally influenced inland waters were conveyed by the United States to Mississippi as part of the state-owned public trust.

PARTIES TO THE PROCEEDING BELOW

In the proceeding before the Mississippi Supreme Court, the appellants were Cinque Bambini Partnership, Carroll W. Allen, Lydia Carroll, Hamilton Allen, Harry B. Kelleher, Spooner Petroleum Company, Enserch Exploration, Inc., and Phillips Petroleum Company. Only Phillips Petroleum Company and Cinque Bambini Partnership are petitioners in this Court.

The appellees below, and the respondents in this Court, were the State of Mississippi and Saga Petroleum U.S., Inc.

RULE 28.1 LISTING

The Rule 28.1 list of parents, subsidiaries and affiliates of Phillips Petroleum Company, a petitioner herein, is contained in Appendix C hereto, p. 75a, *infra*.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

1. The decision below raises an equal footing problem of importance to all states 8

2. The "toothpick navigability" test created by the court below conflicts with this Court's historic "navigability-in-fact" test 11

3. Implementation of the decision below has a devastating impact on private landholdings in Mississippi 17

CONCLUSION 19

Appendix A (Mississippi Supreme Court opinion and judgment) 1a

Appendix B (Hancock County Chancery Court findings, ruling and judgment) 29a

Appendix C (Rule 28.1 listing of Phillips Petroleum Company) 75a

TABLE OF AUTHORITIES

Cases: Page

Barney v. Keokuk,
94 U.S. 324 (1876) 15

Bonelli Cattle Co. v. Arizona,
414 U.S. 313 (1973) 16

Borax, Ltd. v. Los Angeles,
296 U.S. 10 (1935) 7

California ex rel. State Lands Comm'n v. United States,
457 U.S. 273 (1982) 7

City of Newark v. Natural Resource Council,
82 N.J. 530, 414 A.2d 1304 (1980), *cert. denied*,
449 U.S. 983 (1980) 10

Illinois Railroad Co. v. Illinois,
146 U.S. 387 (1892) 12, 13, 15

McGilvra v. Ross,
215 U.S. 70 (1909) 12, 13, 15

Martin v. Waddell,
41 U.S. (16 Pet.) 367 (1842) 7, 11, 15

Montana v. United States,
450 U.S. 544 (1981) 9, 12, 14

Oklahoma v. Texas,
258 U.S. 574 (1922) 9, 12

O'Neill v. State Highway Dept.,
50 N.J. 307, 235 A.2d 1 (1967) 11

Pollard's Lessee v. Hagan,
44 U.S. (3 How.) 212 (1845) 10, 15

Page

Propeller Genesee Chief v. Fitzhugh,
53 U.S. (12 How.) 443 (1851) 15

Scott v. Lattig,
227 U.S. 229 (1913) 13

Shively v. Bowlby,
152 U.S. 1 (1894) 13, 15

State Land Board v. Corvallis Sand & Gravel Co.,
429 U.S. 363 (1977) 10

United States v. California,
332 U.S. 19 (1947) 16

Utah v. United States,
No. 85-1772 (U.S.S.C.) 10

Constitution and Statutes:

United States Constitution, Art. IV, Sec. 3 2

Act of March 1, 1817, 3 Stat. 348 2

Resolution of Dec. 10, 1817, 3 Stat. 472 2

Act of March 3, 1819, 3 Stat. 528 4

Act of May 8, 1822, 3 Stat. 707 4

Act of May 28, 1830, 4 Stat. 408 4

Submerged Lands Act, 43 U.S.C. §1311(a) 16

Coastal Wetlands Protection Law, Sec. 49-27-5,
Miss. Code Ann. (Supp. 1986) 3, 4

Page

Miscellaneous:

Jampol, The Questionable Renaissance of the Tidelands Trust Doctrine in California, 13 Southwestern U. L. Rev. 1 (1982) 18

Note, Tideland Ownership – Time for Reform, 36 U. Cinn. L. Rev. 121 (1967) 18

Porro and Teleky, Marshland Title Dilemma: A Tidal Phenomenon, 3 Seton Hall L. Rev. 323 (1972) 17

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No. _____

PHILLIPS PETROLEUM COMPANY, and
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v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

The petitioners, Phillips Petroleum Company and Cinque Bambini Partnership, respectfully pray that a writ of certiorari issue to review the judgment and the opinion of the Supreme Court of Mississippi entered in this proceeding.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi, as modified on rehearing, is reported at 491 So.2d 508. It is reprinted in Appendix A hereto, App. 1a-26a, *infra.*

The Findings and Ruling of the Chancery Court of Hancock County, Mississippi, are not officialy reported. They are reprinted in Appendix B hereto, App. 30a-70a, *infra.*

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on May 14, 1986., App. 27a, *infra*. A petition for rehearing was denied on July 30, 1986, accompanied by a modification of the original opinion of the court. App. 28a, *infra*. On October 15, 1986, Justice Whtie signed an order extending the time for filing this petition for writ of certiorari to and including November 28, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article IV:

> "Section 3. New States may be admitted by the Congress into this Union; . . . ."

Act of March 1, 1817, 3 Stat. 348:

> ". . . the inhabitants of the western part of the Mississippi territory . . . hereby are authorized to form for themselves a constitution and state government . . . and the said state, when formed, shall be admitted into the union upon the same footing with the original states, in all respects whatever."

Resolution of December 10, 1817, 3 Stat. 472, 473:

> *"Resolved* . . . That the state of Mississippi shall be one, and is hereby declared to be one, of the United States of America, and admitted into the union on an equal footing with the original states, in all respects whatever."

The Coastal Wetlands Protection Law, Sec. 49-27-5, Mississippi Code Annotated (Supp. 1986):

> "a) 'Coastal wetlands' means all publicly owned lands subject to the ebb and flow of the tide; which are below the watermark of ordinary high tide; all publicly owned accretions above the watermark of ordinary high tide and all publicly owned submerged water-bottoms below the watermark of ordinary high tide."

STATEMENT OF THE CASE

This land title dispute coming here from the Mississippi Supreme Court involves a major federal question. At the time of Mississippi's "equal footing" statehood in 1817, were the lands under the tidally influenced but non-navigable inland waters conveyed by the United States to Mississippi as part of the state-owned public trust?

A. The nature of the wetlands in issue

The underlying facts are not in controversy. They are accurately summarized in the opinion of the Mississippi Supreme Court (App. 1a, *infra*), and detailed in the findings of fact of the Chancery Court of Hancock County, Miss. (App. 29a, *infrx*).

At the commencement of this suit in 1978, the title dispute involved some 2400 upland acres of largely undeveloped agricultural land in Hancock County, a county bounded on the south by the Mississippi Gulf Coast. These lands either border upon or are traversed by bayous, streams or ditches in which the ebb and flow of the tide are discernible. In some instances the lands border on tidal waters. In other instances the tidal waters are included within the description of the lands owned; that is, the

original survey lines run straight across the waterways and no mention is made of them in the land descriptions.

For over 150 years, record title to these acres was quietly enjoyed by the private owners thereof, including the petitioners herein and their predecessors in interest. Their titles are traceable back to pre-statehood Spanish land grants, dated April 15, 1813, when the area was still known as Spanish West Florida.[1]

Following a thorough administrative examination of the Spanish land grant claims, Congress expressly recognized the grants "as valid and complete titles, against any claim on the part of the United States, or right derived from the United States." Act of March 3, 1819, 3 Stat. 528, 529; Act of May 8, 1822, 3 Stat. 707; Act of May 28, 1830, 4 Stat. 408. The Mississippi Supreme Court, however, held that these three congressional confirmations of title "are of no force and effect, for such title to these lands as may ever have been held by the United States was effectively and irrevocably granted to the State of Mississippi on the occasion of statehood in 1817." App. 19a-20a, *infra*.

Mississippi never exhibited any interest in these privately held wetlands until the enactment of the Coastal

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[1]The Mississippi Supreme Court adopted the State's suggestion "that no recognition is [to be] accorded titles to lands in Spanish West Florida under Spanish grants after 1783." App. 18a, *infra*. The court offered the following historical justification for that conclusion: "On October 27, 1810, President Madison proclaimed West Florida south of the 31st parallel a part of the Untited States. On February 12, 1812, the Congress authorized the President to take West Florida below the 31st parallel. 3 Stat. 472 (1812). On May 14, 1812, the area with which we are here concerned was formally annexed to the Mississippi Territory. 2 Stat. 734 (1812). Cinque Bambini, et al., claim under Spanish grants said to be dated from April 15, 1813. Such grants came too late." App. 19a, *infra*.

Wetlands Protection Law in 1973. Miss. Code Ann. §49-27-1 through -69 (Supp. 1986). This statute charged the Mississippi Marine Resources Council with the task of preparing maps identifying state-owned wetlands, for regulatory purposes. Section 49-27-5 defined the term "coastal wetlands" to include "all publicly owned lands subject to the ebb and flow of the tide; which are below the watermark of ordinary high tide."

Maps were then drawn from infrared aerial photographs, which purport to show the impact and extent of salt water incursions. The maps were necessarily imprecise and were not drawn for the purpose of indicating legal titles or claims to any of the wetlands; they were drawn solely for the purpose of indicating the probable scope of the state's wetlands. Nonetheless, the Mississippi Mineral Lease Commission began to use the maps as indicating the boundaries of the state-owned public trust wetlands and to sell oil and gas leases on the wetlands thus delineated.

In 1977 the Commission leased some 600 acres of wetlands, the record title to which had long resided with the petitioner Cinque Bambini and others, to the respondent Saga Petroleum U.S., Inc. The leases were recorded in the chancery clerk's office in Hancock County.

Upon learning of these oil leases, Cinque Bambini and other record title holders instituted this suit in 1978 to confirm and remove clouds from their titles. The State of Mississippi and its lessee Saga Petroleum were named as defendants. Answers and counterclaims were filed by the defendants.

After extended proceedings in the Chancery Court of Hancock County, the court entered detailed findings and conclusions. App. 29a-70a, *infra*. The court held that only

about 141 of the 2400 acres claimed by the state are within the state-owned public trust. The court found two categories of tidally-influenced wetlands within those 141 acres: (1) slightly over 98 acres consist of two lakes dredged by a state contractor in the mid-1960s to obtain fill material for the construction of an interstate highway, I-10; and (2) slightly over 42 acres consist of the north branch of Bayou LaCroix and eleven (11) small drainage streams ranging in size from .44 acres to 9.966 acres (the total surface area for six of these streams being less than one acre each).

B. The Mississippi Supreme Court ruling

On the appeal by the private claimants, the Mississippi Supreme Court affirmed the Chancery Court's ruling in part and reversed in part. Specifically, the Supreme Court held:

(1) The two artificially created lake tidelands do not belong to the state inasmuch as the beds beneath the waters were not tidelands in 1817, the year of statehood. To strip those wetlands from the private record title holders would constitute an uncompensated taking in violation of both the federal and state constitutions. App. 23a-24a, *infra*.

(2) The remaining 42 acres covered by the north branch of Bayou LaCroix and the eleven drainage streams, being tidally influenced in 1817 even though non-navigable, are within the public trust of Mississippi. See App. 2a, 15a, *infra*. Such lands were effectively and irrevocably granted to the state on the occasion of statehood in 1817. The Supreme Court accordingly remanded the proceeding to the Chancery Court to establish more precise outer boundaries of these public trust wetlands. App. 26a, *infra*.

In so ruling, the Mississippi Supreme Court addressed and relied upon what it conceived to be the decisive point of federal law[2] – "whether at the time of statehood tidally influenced non-navigable waters were included in the state owned public trust." App. 9a, *infra*. The court acknowledged that all parties before it had addressed that federal question. The private claimants, said the court, had argued that, while early federal cases had referred to public trust land as including all lands within the "ebb and flow of the tide," subsequent decisions of this Court, beginning with *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367 (1842), had translated the "ebb and flow" concept into a "navigable waters" concept. According to this argument, the state owned public trust included "only those waters navigable in fact in 1817, tidal influence being essentially irrelevant." App. 8a, *infra*. The State, on the other hand, argued that, "in addition to such navigable waters, the trust also includes all lands subject to the ebb and flow of the tide in 1817 and below the then mean high water mark." App. 8a-9a, *infra*.

The Mississippi court could find "no federal case expressly deciding this point of federal law." App. 9a, *infra*. It accordingly fashioned its own principle that, "as a matter of federal law, the United States granted to this State in 1817 all lands subject to the ebb and flow of the tide and up to the then mean high water level, without regard to navigability." App. 10a, *infra*. In the course of marking the public trust boundaries by the tidal high water mark, the

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[2]The court stated that "the question of what lands are given to the State in trust is necessarily a question of federal law." App. 7a-8a, *infra*. See *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 22 (1935); *California ex rel. State Lands Comm'n* v. *United States*, 457 U.S. 273, 286 n. 14 (1982).

court referred to the physical fact that even navigable streams and channels contain some non-navigable parts, particularly near the shorelines. So, for purposes of dealing with tidally influenced waters, the court tried to equate the navigability-in-fact test with the ebb-and-flow test by creating a novel "toothpick" test, i.e.,

> ". . . so long as by unbroken water course — when the level of the water is at mean high water mark — one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries we consider the United States set for the properties granted the State in trust." App. 12a, *infra*.

The court concluded that the 42 acres covered by the north branch of Bayou LaCroix and the eleven drainage streams, being non-navigable except by a toothpick propelled by the tide, were part of the public trust conveyed by the United States to Mississippi in 1817. The fee simple titles stemming from the Spanish land grants and from the confirming Acts of Congess were thus held to be without force or effect. And the State is now free to execute oil, gas and mineral leases to various oil companies, such as the respondent Saga Petroleum, covering water bottoms which are also claimed by the upland owners.

REASONS FOR GRANTING THE WRIT

1. The decision below raises an equal footing problem of importance to all states

The decision of the Mississippi Supreme Court poses a unique problem of signal importance to "the constitutional rule of equality among the States whereby each new

State becomes, as was each of the original States, the owner of the soil underlying the navigable waters within its borders." *Oklahoma* v. *Texas*, 258 U.S. 574, 583 (1922).

Does that constitutional rule, known as the equal footing doctrine, permit a coastal state like Mississippi to acquire a "more-than-equal" footing as of the time of statehood? The decision below appears to give an affirmative answer. Until now equality in footing has been achieved by recognizing that all states upon admission acquire a public trust "ownership of land under navigable waters [as] an incident of sovereignty." *Montana* v. *United States*, 450 U.S. 544, 551 (1981). A similar trust dominionship of land under non-navigable but tidally affected waters has not been recognized, at least by this Court.

To that extent, the Mississippi decision – particularly if left unreviewed – will create an imbalance in the equal footing doctrine, an imbalance that favors coastal states with tidally influenced non-navigable waters. Whereas the coastal states will possess trust dominion as to non-navigable tidewaters, the inland states will continue to possess no dominion whatever as to the lands submerged under non-navigable freshwaters that are not tidally influenced. The Mississippi court described this imbalance as a "logical incongruity" that may have "no reasoned basis" but ascribed the "well settled" imbalance to decisions of this Court. App. 16a, *infra*. Yet, in another part of its opinion, the Mississippi court claimed that "we find no federal case expressly deciding this point of federal law." App. 9a, *infra*. This Court should now clarify and rectify the Mississippi court's confusing application of the equal footing doctrine and the resulting doctrinal extension favoring coastal states.

On numerous occasions this Court has deemed efforts to limit the scope of the state owned public trust land of

such extraordinary importance as to warrant plenary consideration. In *Pollard's Lessee* v. *Hagan,* 44 U.S. (3 How.) 212, 220 (1845), for example, the Court approached the problem whether the United States could retain any municipal sovereignty, jurisdiction or right over the soil beneath navigable waters, conveyed to Alabama at statehood, "with a just sense of its great importance to all the states of the union, and particularly to the new ones." Justice Catron's dissent deemed the matter "the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds." *Id.*, at 235.[3]

Much the same sense of constitutional importance presumably underlies the recent grant of certiorari in *Utah* v. *United States,* No. 85-1772, 55 U.S.Law Week 3257 (Oct. 14, 1986). That case presents another facet of the public trust doctrine, this time involving a navigable freshwater lake in Utah. More precisely, the issue is whether a pre-statehood federal law, reserving federal title to Utah Lake for reservoir purposes, defeats Utah's entitlement to the bed of the lake under the equal footing doctrine.

Note should be made of the denial of certiorari in No. 80-432, *City of Newark* v. *Natural Resource Council,* 449 U.S. 983 (1980), a case implicating state ownership of the New Jersey marshlands. The New Jersey Supreme Court's opinion asserted that this Court had never rejected the tidal ebb and flow standard as the basis for sovereign ownership of land beneath tidally-flowed, but non-navigable waters. 82 N.J. 530, 543-44, 414 A.2d 1304, 1310-11

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[3]Both the sentiments of the majority opinion in *Pollard's Lessee* and the remarks in Justice Catron's dissent were quoted with approval in *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373 (1977).

(1980).[4] The state attorney general opposed the grant of certiorari, arguing that the standard for sovereign ownership of the marshlands was a purely collateral and unnecessary issue, since the case merely involved a question whether administrative maps of the marshlands had been properly prepared as required by statute. This may explain the denial of certiorari. Moreover, since New Jersey is one of the original thirteen states, there was no federal issue arising under the equal footing doctrine.

In sum, it is clear that this Court has never resolved the constitutional propriety of extending the public trust doctrine to the non-navigable but tidally influenced wetlands of coastal states. As the ultimate arbiter of the public trust and the equal footing doctrines, the Court should grant certiorari in this case.

2. The "toothpick navigability" test created by the court below conflicts with this Court's historic "navigability-in-fact" test

The opinion below creates a novel and dubious "toothpick" test of navigability for defining public trust boundaries of otherwise non-navigable but tidally influenced wetlands. Such a test confounds both history and geophysics. Furthermore, it conflicts with the repeated decisions of this Court that the wetlands to which the states acquire public trust dominion are those beneath *navigable* waters, tidal or fresh. See *Martin* v. *Waddell,* 41

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[4]The statements in the *Newark* opinion of the New Jersey Supreme Court with reference to sovereign ownership based on tidal flow, irrespective of navigability, were cross-reference summaries of the seminal New Jersey decision declaring such ownership to be the rule in New Jersey. *O'Neill* v. *State Highway Dept.*, 50 N.J. 307, 235 A.2d 1 (1967). Certiorari was not sought in the *O'Neill* case, possibly because it rested on state law grounds.

U.S. (16 Pet.) 367, 410 (1842) (navigable ebb and flow tidewaters); *Montana* v. *United States,* 450 U.S. 544, 551 (1981) (navigable freshwater river); *Illinois Central Railroad* v. *Illinois,* 146 U.S. 387, 452 (1892) (navigable Lake Michigan).

The absence of any decision of this Court extending the public trust doctrine to non-navigable waters, whether by use of a toothpick analogy or otherwise, is quite understandable. Navigability has always been the touchstone of this Court's treatment of the public trust doctrine, and rightly so. The one common denominator that creates equality of footing in state public trust dominion over wetlands, in both coastal and inland states, is navigability. Navigability in this context, moreover, has always been held to mean "navigability in fact." *McGilvra* v. *Ross,* 215 U.S. 70, 78 (1909) ("navigable waters" means "waters which [are] navigable in fact"); *Oklahoma* v. *Texas,* 258 U.S. 574, 586 (1922) ("the settled rule in this country [is] that navigability in fact is the test of navigability in law"). What is navigable in fact turns not upon the navigability of a toothpick under sail but upon whether, in the words of the *Oklahoma* decision, *id.,* the water

> ". . . is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

Only if navigability in fact means susceptibility to use as "a highway for commerce" in trade and travel can one of the constitutional concerns underlying the public trust doctrine be respected, i.e., that the wetlands that are conveyed to the states as a public trust must be deemed subject to the paramount power of Congress to regulate the com-

merce and navigation on such waters. *Scott* v. *Lattig,* 227 U.S. 229, 242-243 (1913). Congress has no such superior commerce easement or concern as to waters that are in fact commercially non-navigable, whether or not they are affected by the ebb and flow of the tide. Nor is there any overriding public interest in preserving non-navigable waters, even of the tidally influenced variety, for such public uses as navigation, swimming or fishing; nor is there any correlative public interest in protecting such waters "from private interruption and encroachment," *Illinois Central Railroad* v. *Illinois,* 146 U.S. 387, 436 (1892).

Indeed, the Mississippi court's assertion of public trust dominion over tidally influenced but non-navigable wetlands appears to be in direct conflict with *Shively* v. *Bowlby,* 152 U.S. 1 (1894), where where a similar contention was rejected. In later summarizing the *Shively* ruling, this Court wrote in *McGilvra* v. *Ross,* 215 U.S. at 78:

> "It is enough to say that the [ebb and flow] test of navigability of waters insisted on has had no place in American jurisprudence since the decision in the case of *The Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 443, and is therefore no test of riparian ownership. This is the effect of *Shively* v. *Bowlby,* 152 U.S., *supra.* The whole doctrine is there displayed, and the court declared (152 U.S., p. 11) that on account of the 'diversity of view as to the scope and effect of the previous decisions of this court upon the subject of public and private rights in lands below high-water mark of navigable waters,' it appeared 'to be a fit occasion for a full review of those decisions and a consideration of other authorities upon the subject.' And the term 'navigable wa-

> ters,' as there used, meant waters which were navigable in fact. The definition was not inadvertent or unnecessary. It was that to which the reasoning conducted and which became the test of the dominion of the national and state governments over shore lands and the rights which they had or could convey."

The court below refused to apply the *Shively* "navigability-in-fact" test, claiming that it reflects a post-1817 "complete redefinition" of the public trust doctrine that "has the effect of removing from the Mississippi public trust ["ebb and flow"] properties once within it." App. 9a, *infra*. That ruling, itself worthy of this Court's attention, is questionable from practical and historical standpoints, as well as lacking any definitive support in this Court's rulings.

First, the Mississippi court suggests (App. 10a, *infra*) that because a navigable stream like the Mississippi River contains some non-navigable parts, such as the shallow areas near the riverbank, navigability-in-fact cannot be the sole test for determining the public trust nature of purely non-navigable tidal waters.[5] That suggestion misconceives the thrust of the navigability-in-fact test. That test is directed at the navigability of the mainstream of the water course. If that mainstream is navigable, the river is no less navigable because water near the riverbanks is shallower than the mainstream. Practically speaking, such a navi-

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[5]In support of that suggestion, the Mississippi court cites (App. 10a, *infra*) *Montana* v. *United States*, 450 U.S. 544, 551 (1981). But the *Montana* opinion merely states: "Though the owners of land riparian to *nonnavigable* streams may own the adjacent riverbed, conveyance by the United States of land riparian to a *navigable* river carries no interest in the riverbed."

gable river is quite different from a bayou or stream no part of which is navigable in fact.

Second, the Mississippi court revives (App. 8a-9a, *infra*) a long-discredited notion that the public trust doctrine, which America inherited from England, has always – and particularly in 1817 – encompassed "tidewaters" or lands that are subject to the "ebb and flow of the tide," all without regard to navigability. This Court long ago rejected that historical misconception. Chief Justice Taney, writing for the Court in *The Propeller Genesee Chief* v. *Fitzhugh,* 53 U.S. (12 How.) 443, 454-455 (1851), demonstrated that in England, where all navigable rivers are tidally influenced, "tidewaters" and "navigable waters" were synonymous terms. But the doctrine that the crown had dominion over and ownership of lands under tidewaters was founded not "upon the existence of the tide over the lands, but upon the fact that the waters are navigable." *Illinois Central Railroad* v. *Illinois,* 146 U.S. 387, 436 (1892), relying on *Genesee Chief, supra.*

While some early American cases continued to use the terms synonymously in the English tradition, the fact that many navigable waters in this country are not tidally influenced (and vice versa) rendered tidal ebb and flow useless either as (1) a synonym of navigability or (2) an alternative description of submerged public trust lands. What emerged in this country was the essence of the common law public trust doctrine, i.e., state dominion of the lands under navigable waters. See, e.g., *Pollard's Lessee* v. *Hagan,* 44 U.S. (3 How.) 212, 225 (1845); *Martin* v. *Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842); *Barney* v. *Keokuk,* 94 U.S. 324, 338 (1876); *Shively* v. *Bowlby,* 152 U.S. 1, 57-58 (1894); *McGilvra* v. *Ross,* 215 U.S. 70, 78 (1909); *Illinois Central Railroad* v. *Illinois, supra.*

In virtually every decision of this Court dealing with the public trust doctrine, particularly in the context of the admission of states on an equal footing, the Court has referred to the state-owned trust in terms of the "navigable tidewaters," *United States* v. *California,* 332 U.S. 19, 30 (1947), or "lands beneath navigable waters," *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 318, 321-324 (1973), or "ownership of land udner navigable waters," *Montana* v. *United States,* 450 U.S. 544, 551 (1981).[6] See also the Submerged Lands Act provision confirming state "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States." 43 U.S.C. §1311(a).

In the conceded absence of binding precedent in this Court recognizing, as of 1817 or any other time, state public trust ownership over non-navigable tidewaters, the "toothpick" decision of the Mississippi Supreme Court is in conflict with all the foregoing decisions of this Court that limit ownership to lands submerged under waters that are navigable in fact.

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[6]In *Utah* v. *United States,* No. 85-1772, now pending before the Court for decision, the Attorney General of Mississippi joined the attorneys general of 29 other states in an *amici curiae* brief supporting Utah's petition for certiorari. That brief states (at p. 5) that "This Court repeatedly has recognized that the several states own the beds of navigable waterbodies as an inherent attribute of state sovereignty." The opposition brief of the Solicitor General of the United States also describes (at p. 6) one aspect of the equal footing doctrine to be "that a newly admitted state in general has the same right as the original states to lands beneath navigable waters."

3. Implementation of the decision below has a devastating impact on private landholdings in Mississippi

The Mississippi Supreme Court concedes that there are "great public interests and neither insignificant nor illegitimate private interests" at stake in this proceeding. App. 1a, *infra*. The court further acknowledges that extension of the "toothpick" doctrine to non-navigable tidally influenced waters "is of enormous importance to the Mississippi Gulf Coast." App. 9a, *infra*.

The "enormous importance" of this problem is partially reflected in the severe impact of the decision below on the land rights of those Mississippians whose titles and leasehold interests respecting non-navigable streams on their property have been considered settled for over 150 years. The decision below threatens thousands of residential and commercial owners and users of the upland wetlands of Mississippi, throwing their rights into confusion and implicating the concerns of title insurance companies, lenders, tax authorities, and the like.

Multitudes of expensive and prolonged land title lawsuits will likely be spawned by the decision below. Already the instant dispute over some 2400 acres has occupied nearly 10 years of the time and energies of courts, counsel and litigants, at the cost of more than a million dollars in hiring expert witnesses, taking depositions, surveying the wetlands in question, and incurring attorney fees. The end is not yet in sight, for the case is to be returned to the trial court to determine more precisely the wetland boundaries as of 1817 – a difficult and expensive geophysical feat in and of itself.

Mississippi may well suffer the fate of New Jersey. Following a 1960 state court decision retroactively asserting

public trust dominion over 244,000 acres of non-navigable marshlands in New Jersey, the rights of between 50,000 and 60,000 individual property owners were cast into confusion. State courts were inundated with title disputes as the boundaries of the dominion were litigated on a case-by-case basis. See Porro and Teleky, *Marshland Title Dilemma: A Tidal Phenomenon,* 3 Seton Hall L. Rev. 323 (1972); Note, *Tideland Ownership — Time to Reform,* 36 U. Cinn. L. Rev. 121 (1967). Likewise, in California, state court decisions asserting retroactive state title to coastal tidelands have thrown into "confusion and disarray previously secure titles and investors' expectations." Jampol, *The Questionable Renaissance of the Tidelands Trust Doctrine in California,* 13 Southwestern U. L. Rev. 1, 82 (1982).

It is unfortunate that Mississippi, in its desire to exploit mineral resources, has seen fit to resort to a dubious "toothpick" theory of state public trust title, and to assert such title on a retroactive basis going back more than 150 years. Mississippi's belated public trust claim implicates the constitutional rights of the record title holders not to have their property taken for public use without just compensation.

The historical and precedential footings of this retroactive claim are highly questionable, and certainly deserving of review by this Court.

CONCLUSION

For all the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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November 28, 1986

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,306

CINQUE BAMBINI PARTNERSHIP, CARROLL W. ALLEN, LYDIA CARROLL, HAMILTON ALLEN, HARRY B. KELLEHER, SPOONER PETROLEUM COMPANY, AND ENSERCH EXPLORATION, INC. AND PHILLIPS PETROLEUM COMPANY

V.

STATE OF MISSISSIPPI AND SAGA PETROLEUM U.S., INC.

EN BANC [May 14, 1986, as modified on rehearing, July 30, 1986]

ROBERTSON, JUSTICE, FOR THE COURT:

I.

Though great public interests and neither insignificant nor illegitimate private interests are present and in conflict, this in the end is a title suit. Plaintiffs, Cinque Bambini Partnership and others ("Cinque Bambini"), have brought an action to confirm title and remove clouds from title to 2400 acres of largely undeveloped property in Hancock County near the Mississippi Gulf Coast. As the lands are arguably tidelands, the State of Mississippi claims title in its capacity as trustee of the federally created public trust, vintage 1817, the year of statehood.

Accepting the State's view of the geographical contours of the public trust, the Chancery Court of Hancock County ruled that the State owns 140.863 of the 2400 acres Cin-

que Bambini claims. Ninety-eight of the 140 plus acres consist of two lakes that were dredged by the State's general contractor in the mid-1960s to obtain fill material for construction of Interstate Highway I-10. The remaining forty-two plus acres consist of the north branch of Bayou LaCroix and eleven small drainage streams ranging in size from .44 acres to 9.966 acres. The total surface area for six of the streams is less than one acre each.

The private landowners, Cinque Bambini, et al, claiming under Spanish grants purportedly confirmed by the Congress of the United States, have appealed arguing, inter alia, that the Chancery Court erred in the definition of the geographical contours of the public trust.

For the reasons explained below, we hold that fee simple title to all lands naturally subject to tidal influence, inland to today's mean high water mark, is held by the State of Mississippi in trust. On the other hand, lands brought within the ebb and flow of the tide by avulsion or by artificial or non-natural means are owned by their private record titleholders. We affirm in part and reverse in part.

II.

There are no material disputes in the facts. Cinque Bambini and others are vested with record title, derived from pre-statehood Spanish land grants said to date back to April 15, 1813 and to have been expressly confirmed by Acts of the Congress, and from federal and state patents. This avails Cinque Bambini nothing, however, if the lands in dispute are a part of those held by the State of Mississippi by virtue of a trust created at the time Mississippi was admitted to the Union in 1817. For all practical purposes, the case turns on whether the disputed lands are a part of the public trust.

The present dispute seems to have its genesis in the Coastal Wetlands Protection Law enacted by the Mississippi Legislature in 1973. Miss. Code Ann. §49-27-1 thru -69 (Supp.1985). This law charged the Mississippi Marine Resources Council (MMRC) with preparing maps identifying the state-owned wetlands. These maps were made by state employees who "eyeballed" aerial photographs to determine the boundaries of the wetland areas. The purpose of these maps was to provide a method whereby the MMRC could determine whether any given event was occurring on land in its jurisdiction – that is, in a wetlands area. These wetland maps were recorded in the office of each chancery clerk in the three coastal counties.

Notwithstanding these beginnings, the issue of the day, pragmatically speaking, appear to be, who will enjoy the revenues from anticipated oil and gas exploration. Contrary to instructions from the MMRC – who warned that the maps were inaccurate and for jurisdictional purposes only – the Mississippi Mineral Lease Commission used these wetland maps to delineate the state-owned land upon which it would then sell oil and gas leases. In following this practice, the Lease Commission leased 600 acres of land – record title to which resided in Cinque Bambini, et al – to Saga Petroleum U.S., Inc. in 1977. These leases were recorded in the Office of the Chancery Clerk for Hancock County, Mississippi.

When Cinque Bambini, et al, learned of these oil leases, they brought suit to confirm and remove clouds from their title. The State of Mississippi answered and counterclaimed. From an adverse ruling regarding the geographical contours of the public trust, Cinque Bambini and the other private landowners appeal.

III.

Prior to Mississippi's statehood, title to all property within what became this state's geographical confines was vested in the federal sovereign, the United States of America, subject to exception to be explained in Section V below. This included all surface waters, as well as the lands and beds of those waters and streams.

At the time of statehood, the United States created two great public trusts and conveyed to each new state, including the State of Mississippi, lands to be held by the state for the public purpose. The first of these was the familiar school lands trust into which the sixteenth section from each township has been placed. *Turney v. Marion County Board of Education*, 481 So.2d 770, 776-77, 783-84 (Miss.1985). The second trust, the one with which we are concerned today, had placed within it the tidelands and navigable waters of the state together with the beds and lands underneath same. *See State ex rel. Rice v. Stewart*, 184 Miss. 202, 234, 184 So. 44, 51 (1938). In each instance the federal sovereign, in recognition of public concerns which seem to override mere private interests, granted to the state fee simple title in certain properties to be held by the state for the benefit of all its people.[1]

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[1]Much scholarly commentary regarding the nature, scope and history of the public trust has been published in recent years. *See, e.g.*, Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 Mich.L.Rev. 473 (1970); Sax, *Liberating The Public Trust Doctrine From Its Historical Shackles*, 14 U.C.Davis L.Rev. 185 (1980); Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes The People's Environmental Right*, 14 U.C. Davis L.Rev. 195 (1980); and Note, *The Public Trust In Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762 (1970). An excellent discussion of the mapping of coastal boundaries is found in Maloney, et al, *The Use And Significance Of The Mean High Water Line In Coastal Boundary Mapping*, 53 No.Car.L.Rev.

The public purposes to which these lands and waters placed in the public trust may be devoted are not static. Over the years those purposes have come to include navigation and transportation, *Rouse v. Saucier's Heirs,* 166 Miss. 704, 146 So. 291 (1933); *Martin v. O'Brien,* 34 Miss. 21 (1857); commerce, *Rouse v. Saucier's Heirs,* 166 Miss. 704, 146 So. 291 (1933); fishing, *State ex rel. Rice v. Stewart,* 184 Miss. 202, 231, 184 So. 44, 50 (1938); bathing, swimming and other recreational activities, *Treuting v. Bridge and Park Commission of City of Biloxi,* 199 So.2d 627, 632-33 (Miss.1967); development of mineral resources, *Treuting v. Bridge and Park Commission of City of Biloxi,* 199 So.2d 627, 633 (Miss.1967); environmental protection and preservation, Miss. Code Ann. §§49-27-3 and -5(a) (Supp.1985); the enhancement of aquatic, avarian and marine life, sea agriculture and no doubt others. *See Marks v. Whitney,* 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790 (1971). Suffice it to say that the purposes of the trust have evolved with the needs and sensitivities of the people — and the capacity of trust properties through proper stewardship to serve those needs.

All of this came about as an outgrowth of federal implementation of the familiar equal footing doctrine. *See e.g., Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.,* 429 U.S. 363, 370-78, 97 S.Ct. 582, 50 L.Ed.2d 550, 558-63 (1977); *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845). The original

185 (1974). Trouble spots are discussed in Porro, et al, *Marshland Title Dilemma: A Tidal Phenomenon,* 3 Seton Hall L.Rev. 323 (1972). An articulate voice in dissent appears in Jampol, *The Questionable Renaissance Of The Tidelands Trust Doctrine In California,* 13 Southwestern U.L.Rev. 1 (1982). Nothing said here should be taken as endorsement of the views expressed in any of these articles. Collectively, they provide a valuable context for understanding the public trust doctrine and its importance, yesterday and today.

states withheld their tidelands and navigable waters from the United States at the time of adoption of the Constitution. Those lands and waters so reserved by the states were held in trust for the public benefit. *See, e.g., Arnold v. Mundy,* 6 N.J.L. 1 (1821). Thereafter, each new state was admitted to the Union on an equal footing with the original thirteen, *viz.* as each one of the thirteen held its tidelands and navigable waters in public trust the United States created like trusts in each new state.[2] *Montana v. United States,* 450 U.S. 544, 551, 101 S.Ct. 1245, 67 L.Ed.2d 493, 501 (1981). The point for the moment is that once Mississippi had been admitted to the Union and once the public trust had been created and funded, the role of the equal footing policy ended and title to the lands conveyed in trusts became vested in the state, subject, of course, to the trust. *See Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376, 97 S.Ct. 582, 590, 50 LEd.2d 550, 562 (1977); *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892).

Federal law recognizes state authority over trust properties as plenary;[3] once the trust was funded, so to

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[2]The Act of March 1, 1817, authorizing the formation of the State of Mississippi provided that the new state should

> be admitted into the Union upon the same footing with the original states in all respects whatever.

3 Stat. 472, 473 (1817).
The conditions of the March, 1817, enactment having been met, the Congress of the United States on December 10, 1817 formally admitted Mississippi

> into the Union on an equal footing with the original states, in all respects whatever.

[3]Though not relevant here, the State's interests in the trust property have remained subject to "the paramount power" of the United States to regulate navigability pursuant to commerce clause. *Montana v. United States,* 450 U.S. 544, 551-52, 101 S.Ct. 1245, 67 L.Ed.2d 493, 501-02 (1981); *Oregon ex rel. State Land Board v. Corvallis Sand &*

speak, the federal role was spent. *Oregon ex. rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 371, 376, 97 S.Ct. 582, 50 L.Ed.2d 550, 558, 562 (1977). State law in turn prohibits disposition or use of trust property except in furtherance of the public purpose. *International Paper Co. v. Mississippi State Highway Dept.*, 271 So.2d 395, 399 (Miss.1972); *Treuting v. Bridge and Park Commission of City of Biloxi*, 199 So.2d 627, 633 (Miss.1967); *Money v. Wood*, 152 Miss. 17, 118 So. 357 (1928). The Attorney General repeatedly and correctly states in his brief that the State may not convey fee simple title to properties so held in trust "unless it is for a higher public purpose and then only by legislative enactment". (Brief for Appellees and Cross-Appellant, filed April 18, 1984, at pp.8, 16). *See Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452-54, 13 S.Ct. 110, 36 L.Ed. 1018, 1042 (1892); *Priewe v. Wisconsin State Land & Improvement Co.*, 93 Wis. 534, 67 N.W. 918 (1896) aff'd on reh., 103 Wis. 537, 79 N.W. 780 (1899).

IV.

A.

We are concerned fundamentally with the inland reach of the trust boundaries, with identification, geographically and topographically, of the lands held by the State of Mississippi in trust *today*. The initial step in that identification process requires that we ascertain exactly what properties were granted to the State in trust in 1817. As the federal settlor held title to all lands prior to statehood and the creation of the trust, and as it was that same federal settlor which determined under the equal footing doctrine which lands it would grant to the State and which it would re-

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Gravel Co., 429 U.S. 363, 375-76, 97 S.Ct. 582, 50 L.Ed.2d 550, 501 (1977); *Rouse v. Saucier's Heirs*, 166 Miss. 704, 713, 146 So. 291, 292 (1933).

serve for patent to private citizens, the question of what lands were given to the State in trust is necessarily a question of federal law. *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 22, 56 S.Ct. 23, 29, 80 L.Ed. 9, 17 (1935); *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 285 n.14, 102 S.Ct. 2432, 2440 n.14, 73 L.Ed.2d 1, 12 n.14 (1982); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373, 97 S.Ct. 582, 588, 50 L.Ed.2d 550, 562 (1977).

What then are the federal principles by which we may establish on-the-ground surveyable boundaries of the properties granted the State of Mississippi in trust in the year 1817? We regard as settled the proposition that, insofar as federal law is concerned, the identity of properties granted by the United States in trust became fixed at the time of statehood. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376, 97 S.Ct. 582, 590, 50 L.Ed.2d 550, 562 (1977); *United States v. Utah*, 283 U.S. 64, 75, 51 S.Ct. 438, 440-41, 75 L.Ed. 844, 849 (1931); *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 477, 13 L.Ed. 220, 223 (1850).

The early federal cases refer to the trust as including all lands within the ebb and flow of the tide. Cinque Bambini argues, nevertheless, that "ebb and flow of the tide" should be translated "navigable waters" and cites several admiralty jurisdiction cases beginning with *The Genessee Chief*, 53 U.S. (12 How.) 443, 13 L.Ed. 1058 (1851). Cinque Bambini's position is that the surveyable boundaries of trust properties were redefined in a series of cases beginning with *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 10 L.Ed. 997 (1842) to include only those waters navigable in fact in 1817, tidal influence being essentially irrelevant. The State's position is that, in addition to such navigable

waters, the trust also includes all lands subject to the ebb and flow of the tide in 1817 and below the then mean high water mark. Resolution of this issue is outcome determinative of much of this case – and, apparently, is of enormous importance to the Mississippi Gulf Coast. We proceed with some temerity as we find no federal case expressly deciding this point of federal law – whether at the time of statehood tidally influenced non-navigable waters were included in the state owned public trust.

The evolution of the so-called redefinition of the trust suggests a clue or two. Originally, "tidewaters," "ebb and flow of the tide," and similar language dominated discussions of the trust. It soon became apparent, however, that many of the new states had no coastline and hence had no lands within the ebb and flow of the tide. If the equal footing doctrine was to have meaning in those inland states, something had to be done to the theretofore restrictive delineation of the trust lands. Following the comparable expansion of admiralty jurisdiction in *The Genessee Chief*, the Supreme Court expanded the definition of the trust to include all navigable freshwaters. *See, e.g., McGilvra v. Ross*, 215 U.S. 70, 30 S.Ct. 27, 54 L.Ed. 95 (1909); *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894), and more recently *Montana v. United States*, 450 U.S. 544, 551, 101 S.Ct. 1245, 67 L.Ed.2d 493, 501 (1981) and *Utah v. United States*, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971). The question posed by these and many like cases is whether the advent of the navigable waters test is, on the one hand, a complete redefinition of the geographical scope of the trust or, on the other hand, a mere addition to the tidelands/tidewaters trust applicable only in the case of non-tidally influenced freshwaters. Put another way, did the navigable waters test have the effect of removing from the Mississippi public trust properties once within it?

It is our view that, as a matter of federal law, the United States granted to this State in 1817 all lands subject to the ebb and flow of the tide and up to the then mean high water level, without regard to navigability. *See Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387, 435-36, 13 S.Ct. 110, 36 L.Ed. 1018, 1036 (1892); *Money v. Wood,* 152 Miss. 17, 28, 118 So. 357, 359 (1928). The more recent navigable waters test provides the insight which explains why this must be so. Navigable waters – whether the Mississippi River, the Pearl River, the Yazoo River or any other natural waterway in this state navigable in fact – by their very nature contain deeper areas that are navigable and more shallow areas, near the riverbank, up in chutes, over bars and the like, that are not. The State's original title to these waters included the navigable as well as the non-navigable parts. *See Montana v. United States,* 450 U.S. 544, 551, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493, 501 (1981). The same of tidewaters. The State of Mississippi was granted in trust certain tidelands fronting the Gulf of Mexico, extending inland up to the 1817 mean high water mark. Some of those areas were at the time navigable in fact and some were not. But the Gulf of Mexico as a whole – even only to the outer limits of Mississippi's territorial limits – is navigable by anyone's definition. That there may be non-navigable areas held by the State in trust is no more anomalous in the case of tidewaters than freshwaters.

Navigable freshwaters do not always strike the riverbank at the same point. Rivers rise and fall, seasonally and with the rains. A more constant boundary of necessity has been found – the high water mark. The Gulf of Mexico, however, shifts its boundaries far more often – as the tide daily ebbs and flows, or, more precisely, as the waters interact gravitationally with the moon. Established and ac-

cepted scientific methods enable us to establish a mean high water – frequently referred to as mean high tide. *See Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 22-27, 56 S.Ct. 23, 80 L.Ed. 9, 18-20 (1935); and *O'Neill v. State Highway Department*, 50 N.J. 307, 235 A.2d 1, 9-10 (1967). That mark is not a line observable on the ground, although it may be plotted by surveyors trained in the field. When plotted we confront the geographical reality of a continuous, unbroken line wildly meandering, to be sure, but reaching from Alabama on the east in uninterrupted sequence to Louisiana on the west. This line is – in theory, at least – ascertainable as of 1817. Federal law recognizes it as the inland boundary of the navigable tidewaters of the State of Mississippi. Fee simple title to all areas south of it was granted to the State in trust.

What emerges is that the legal boundaries of navigable tidewaters are conceptually and functionally the same as those for navigable freshwaters. The high water mark concept is used in both instances. That sophisticated geophysical study by reference to the tidal epoch and the like may customarily be employed in the establishment of mean high tide, while simpler processses are used with navigable rivers, is of no moment. Recognition of the conceptual equivalence of these two approaches to the establishing of certain boundaries for present purposes serves to make clear that the navigable waters test was no new test but the removal of an arbitrary and irrational limitation on the old ebb and flow test. In each instance – freshwaters or tidewaters – the central focus is upon navigable waters, but no one has ever suggested that the boundaries of that granted in trust were the contours of the navigable channel. The boundary of each waterway navigable in fact is that point where mean high water mark (variously determined) strikes land. Within that surveyable, territorial boundary (and outside the navigable channel/area) will

always be some non-navigable areas. Yet so long as by unbroken water course – when the level of the waters is at mean high water mark – one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries we consider the United States set for the properties granted the State in trust.

What was granted the State in trust in 1817 is a function of the positive law of the United States. We are not so much concerned with ascertaining what the federal government intended to grant as with what it did grant. Still, when there is a haze about the contours of what the federal government did grant, it is by no means inappropriate to consider purposes then known as an aid to extrapolation of the geographical boundaries of the grant.

No doubt commerce and navigation were considered vitally important. But fishing and bathing have long coexisted with commerce and navigation as public purposes. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 412-414, 10 L.Ed. 997, 1013 (1842). Waters that are valuable for fishing and bathing purposes often are not navigable in fact – at least not at the point where the fishing and bathing takes place. The point is that exclusion of non-navigable tidewaters from the trust in 1817 would have been inconsistent, if not downright irrational, given then accepted public purposes.

We are reinforced in our view by the fact that the federal cases have continued to use "tide" terminology long after the recognition that non-tidal freshwaters were included in the trust. *See, e.g., Summa Corp. v. California ex rel. State Land Commission*, 466 U.S. 198, 104 S.Ct. 1751, 80 L.Ed. 237, 243 (1984) ("tidelands"); *Borax Con-*

solidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 16, 23, 56 S.Ct. 23, 80 L.Ed. 9, 14, 18 (1935) ("tidelands", "ebb and flow of the tide"); *McGilvra v. Ross*, 215 U.S. 70, 79, 30 S.Ct. 27, 54 L.Ed. 95, 100 (1909). If the navigable waters test had replaced the ebb and flow test, rather than merely extending it to freshwaters, one would have expected the former language to have disappeared. Of course, as explained above, subject to geophysical differences between tidewaters and freshwaters, what has happened in the case of the inland states' public trusts at the time of *The Genessee Chief* and since has been nothing more than a principled extension to freshwaters of the test long employed with tidewaters.

B.

Though we consider here a question of federal law, we may hardly ignore our prior public trust cases. We find those cases consistent with what has been said above. This Court has repeatedly stated its understanding of the geographical scope of the federally created trust as including, at least,

> the soil, and . . . the minerals therein contained, the beds of all its shores, arms and inlets of the sea, wherever the tide ebbs and flows.

State ex rel. Rice v. Stewart, 184 Miss. at 230,184 So. at 49.

Rouse v. Saucier's Heirs, 166 Miss. 704, 146 So. 291 (1933) recognizes the inland extent of the federal grant in trust as including

> title to all land under tidewater, including the spaces between ordinary high and low water marks; . . . .

166 Miss. at 713, 146 So. at 292; *see also International Paper Co. v. Mississippi State Highway Dept.*, 271 So.2d 395, 397-98 (Miss.1973).

Cinque Bambini argue that our cases to date have failed to recognize as within the federal grant any tidal waters which were not navigable in fact. *See State v. Hanson Properties, Inc.*, 371 So.2d 871, 872 (Miss. 1979) (Lowery Island at confluence of Pascagoula River with Mississippi Sound); *H.K. Porter Co., Inc. v. Board of Supervisors of Jackson County*, 324 So.2d 746, 747 (Miss. 1975) (Mississippi Sound Bayou Casotte Ship Channel); *International Paper Co. of Moss Point v. Mississippi State Highway Department*, 271 So.2d 395, 396 (Miss. 1972) (Lowery Island at confluence of Pascagoula River with Mississippi Sound); *Treuting v. Bridge and Park Commission of the City of Biloxi, Mississippi*, 199 So.2d 627, 629 (Miss. 1967) (Mississippi Sound); *Giles v. City of Biloxi*, 237 Miss. 65, 72, 112 So.2d 815, 816 (1959) (Deer Island in Mississippi Sound); *Xidis v. City of Gulfport*, 221 Miss. 79, 83, 72 So.2d 153, 154-55 (1954) (Mississippi Sound); *Crary v. State Highway Commission*, 219 Miss. 284, 287-88, 68 So.2d 468, 469 (1953) (Bay of St. Louis); *State ex rel. Rice v. Stewart*, 184 Miss. 202, 219, 184 So. 44, 45 (1938) (Bayou Bernard, an admitted commercially navigable portion of Biloxi Back Bay); *Rouse v. Saucier's Heirs*, 166 Miss. 704, 711, 146 So. 291, 291 (1933) (Wolfe River, a commercially navigable river flowing into the Bay of St. Louis); *Money v. Wood*, 152 Miss. 17, 25, 118 So. 357, 358 (1928) (Deer Island in Mississippi Sound); *Martin v. O'Brien*, 34 Miss. 21, 27-29 (1857) (Hancock County Beachfront "Seacoast" at town of Shieldsborough). Cinque Bambini overlooks the fact that, from the area of the waters in controversy in each of these cases, our proverbial toothpick sailboat may navigate landward in a generally

northward direction toward the point where mean high water mark intersects with land and, always afloat, cross naturally existing areas comparable to those in controversy here.

That today's case may arguably require that we confront for the first time the State's claim to tidally influenced lands that were not navigable in fact in 1817 need not detain us. Whatever unique facts may appear in the various cases that have heretofore been adjudicated, we have always proceeded upon general principles. Those principles – federal principles – have been repeated too often – here as elsewhere – to admit of serious doubt.

In summary, effective upon statehood on March 1, 1817, we understand federal law to provide that the United States granted to the State of Mississippi in trust all lands, to which the United States then held title, including their mineral and other subsurface resources, subject to the ebb and flow of the tide below the then *mean* high water level – regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea. Similarly granted were the beds and streams of all non-tidal waters which were navigable in fact in 1817. This act of creation consummated, the federal sovereign rested.

C.

Nothing in *Morgan v. Reading*, 11 Miss. (3 S.&M.) 366 (1844) or *Steamboat Magnolia v. Marshall*, 39 Miss. 109 (1860) is to the contrary. To be sure, shallow, non-navigable freshwater streams and the beds beneath same are under our law susceptible of private ownership. Neither federal nor state law has ever held such areas in-

alienable from the public trust. This premise, however, has never been held, directly or by implication, to exclude tidally influenced, non-navigable streams from the public trust.

What Cinque Bambini, et al, have identified here is not support for their claims but a logical incongruity in our law. It may well be that there is no reasoned basis for including small, non-navigable tidewaters within the trust while non-navigable freshwaters are without. That the distinction may not be well reasoned, however, does not keep it from being well settled.

A similar logical incongruity appears in the treatment of the beds of navigable freshwaters as distinguished from the beds of tidewaters. Thanks to the redefinition work done in *Shively v. Bowlby,* 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894); *McGilvra v. Ross,* 215 U.S. 70, 30 S.Ct. 27, 54 L.Ed. 95 (1909); and other similar cases – brought about by the application of the equal footing doctrine to new, interior states having no tidewaters, navigable freshwaters are held by the states in trust. This is true in Mississippi as elsewhere. Yet before anyone perceived that the trust extended to navigable freshwaters, Mississippi had already adopted the common law rule that riparian owners hold the beds of such waters to the center of the stream. *See Morgan v. Reading,* 11 Miss. (3 S.&M.) 366, 399 (1844)[4] This has placed Mississippi's trust in an anomolous position. while the lands below tidewaters may not be alienated except for high public purposes and generally

[4]For an exhaustive consideration of the various approaches other states have taken to the question of riparian owners' rights, *see Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). The currently authoritative consideration of the role of federal law on this point is *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-81, 97 S.Ct. 582, 50 L.Ed.2d 550, 563-65 (1977).

freshwaters are susceptible of wholly private ownership.[5] The United States Supreme Court has ducked this anomaly by holding that, after statehood, state law controls practically everything. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 378-81, 97 S.Ct. 582, 50 L.Ed.2d 550, 563-65 (1977); *Barney v. Keokuk*, 94 U.S. 324, 338, 24 L.Ed. 224 (1876).

In the end, rather than affording Cinque Bambini a basis for relief, these anomalies are merely further evidence of the perceptiveness of Holmes' sage observation that the life of the law has been experience, not logic.[6]

V.

A corollary of the federal rule articulated in Section IV above is the invalidity of an interest in trust lands claimed under a federal patent granted *after* the funding of the trust. "An ordinary federal patent purporting to convey tidelands located within a state to a private individual is invalid, . . ." *Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198, 205, 104 S.Ct. 1751, 1756, 80 L.Ed.2d 237, 243 (1984). If the federal patent was granted *before* statehood, it ran afoul the obligation of the United

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[5]This Court recognized the dilemma in *State ex rel. Rice v. Stewart*, 184 Miss. 230, 184 So. 44 (1938)

> We shall not attempt to argue the reasonableness or unreasonableness of the distinction, but shall concern ourselves only with determining whether or not such distinction does in fact [and in law] exist.

184 So. at 47.

[6]In 1882 Holmes first said this in *The Common Law* on page one: "The life of the law has not been logic: it has been experience." Forty years later he repeated the point more metaphorically: ". . . [A] page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963, 893 (1921).

States to hold such tidelands only in trust for the state. *Borax Co. v. Los Angeles*, 296 U.S. 10, 15-16, 56 S.Ct. 23, 80 L.Ed. 9 (1935). If the federal patent was granted *after* statehood, it was a nullity as it necessarily purported to operate upon interests in real property which, at least insofar as federal law was concerned, had been conveyed to the states in trust – and irrevocably so.

These principles hold only with respect to property fee simple title to which was in the United States at and prior to statehood. If, at the time of acquisition by the United States in its sovereign capacity, property was *already* privately owned, it follows on reason that the title was never in the United States and therefore could not have been held by the United States in trust nor thereafter at statehood granted to the state.

Against this backdrop Cinque Bambini, et al, argue that they hold under Spanish grants dating from April 15, 1813 – four years pre-statehood. These Spanish grants, we are told, had the effect that the United States never acquired title; hence, none could be held for or granted to the State of Mississippi as a part of the public trust. There is precedent for this view in the case of ceded territory where tidelands were, prior to cession, privately owned under grants from Mexico. *See Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198, 204-09, 104 S.Ct. 1751, 1756-58, 80 L.Ed.2d 237, 243-46 (1984); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375, 97 S.Ct. 582, 589, 50 L.Ed.2d 550, 561 (1977); *Knight v. United States Land Association*, 142 U.S. 161, 183, 12 S.Ct. 258, 264, 35 L.Ed. 974, 982 (1891).

We find it suggested, however, that no recognition is accorded titles to lands in Spanish West Florida held under Spanish grants after 1783. *Pollard's Lessee v. Hagan*, 44

U.S. (3 How.) 212, 225, 11 L.Ed. 565, 572 (1845); *Henderson v. Poindexter,* 25 U.S. (12 Wheat.) 530, 535-36, 6 L.Ed. 718, 719-20 (1827). In the latter cited case the Supreme Court concluded

> It follows, that Spanish grants, made after the treaty of peace [September 1783], can have no intrinsic validity, and the holders must depend for their titles on the laws of the United States.

25 U.S. (12 Wheat.) at 535, 6 L.Ed. at 720. *See also, Montgomery v. Ives,* 21 Miss. 161 (1849); and *Doe ex dem. Nevitt v. Beaumont,* 7 Miss. 237 (1842).

All of the cases noted above – *Pollard, Henderson, Montgomery* and *Nevitt* – factually concern lands and waters above 31 degrees North latitude. Concededly, the Spanish claim to West Florida below the 31st parallel was far more legitimate that above it. In our view the same result obtains. On October 27, 1810, President Madison proclaimed West Florida south of the 31st parallel a part of the United States.[7] On February 12, 1812, the Congress authorized the President to take West Florida below the 31st parallel. 3 Stat. 472 (1812). On May 14, 1812, the area with which we are here concerned was formally annexed to the Mississippi Territory. 2 Stat. 734 (1812).

Cinque Bambini, et al, claim under Spanish grants said to be dated from April 15, 1813. Such grants came too late. The acts of Congress of March 3, 1819, May 8, 1822 and May 28, 1830 are of no force and effect, for such title to these lands as may ever have been held by the United States was effectively and irrevocably granted to the State of Mississippi on the occasion of statehood in 1817.

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[7]*See* Abernathy, *The South In The New Nation* 358 (1961); and McLemore, ed., *A History Of Mississippi,* vol. 1, p. 226 (1973), for historical discussions of the annexation of West Florida.

VI.

The extent of the federal grant settled, we know only of the content of the trust in 1817. Waters and the courses they follow and the contours of the lands they adjoin are dynamic, though often imperceptibly so. Properties placed in Mississippi's public trust – tidelands or navigable freshwaters – share this characteristic. This leads to our concern whether the legal boundaries of the trust properties are similarly dynamic.

As explained above, effective upon statehood all tidelands and navigable waters were granted to the state in trust. The trust properties as of that date had distinct surveyable boundaries. The question is whether those boundaries today are the same as those fixed and surveyable – in theory, at least – in 1817. Federal law, it will be recalled, spent its force when the trust was originally funded. As of that moment, in the eyes of federal law, the State became a titleholder in this context like unto any private owner. The trust conditions and purposes subject to which the State then held in no way altered its status from that of a mere titleholder vis-a-vis adjoining or contiguous landowners.

Whether the operation of the forces of nature could thereafter add to or subtract from the properties so held by the State is a matter wholly governed by state law. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977).

Insofar as may be relevant to the case at bar, our law has generally accepted contours. Ordinarily the owner of water bounded lands is entitled to accretions thereto. *H.K. Porter Co., Inc. v. Board of Supervisors of Jackson*

County, 324 So.2d 746, 751 (Miss.1975); *Paepcke v. Kirkman*, 55 F.2d 814, 815 (5th Cir. 1932) (citing Mississippi law); *Anderson-Tully Company v. Franklin*, 307 F.Supp. 539, 542 (N.D.Miss. 1969). These include gradual deposit of alluvial soil upon margin of water or gradual recession of waters, *Harrison County v. Guice*, 244 Miss. 95, 140 So.2d 838 (1962). Accretions may grow and develop adjacent to tidelands or the shores of freshwaters. *See Shively v. Bowlby*, 152 U.S. 1, 35, 14 S.Ct. 548, 561, 38 L.Ed. 331, 344 (1894). With regard to public trust tidelands, our law is settled that title to tracts not in existence at the time of the federal grant but formed subsequently by deposits of silt, soil, etc. from a river, is held by the state. *H.K. Porter Co., Inc. v. Board of Supervisors of Jackson County*, 324 So.2d 746, 751 (Miss.1975); *International Paper Co. v. Mississippi State Highway Dept.*, 271 So.2d 395, 398 (Miss. 1973). The public trust, vintage 1817, may be augmented by accretions and by the natural inland expansion of the tidal influence.

Ordinarily, of course, a private landowner may lose title to lands via reliction as well as gain it via accretion. *Anderson-Tully Co. v. Tingle*, 166 F.2d 224 (5th Cir. 1948) (applying Mississippi law). Our cases suggest that, once held by the state in trust, properties are committed to the public purpose and may be alienated from the state only upon the authority of legislative enactment and then only consistent with the public purposes of the trust. *State of Mississippi v. Hanson Properties, Inc.*, 371 So.2d 871, 873 (Miss.1979); *International Paper Co. v. Mississippi State Highway Dept.*, 271 So.2d 395, 398-99 (Miss.1973); *Treuting v. Bridge and Park Commission of City of Biloxi*, 199 So.2d 627 (Miss.1967). Today's decision does not require that we decide whether the State may lose title to trust lands through reliction and we intimate no opinion

thereon, except again to note that the question is wholly one of state law. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977).

The geophysical tidal experience may enlarge the trust properties. If over decades, epochs or even centuries the tides rise – that is, the mean high water mark rises (and there is reason to believe this has happened and may continue to happen) – the inward reach of the tidal influence expands.[8] More lands are tidally affected. On principle there is no way our law may allow a riparian freshwater title holder the benefit of accretions and deny the owner of tidelands the benefits of the natural inland expansion of the tidal influence. Sufficient unto this day is our holding that, where the forces of nature – gradually and imperceptibly – have operated to expand or enlarge the inland reach of the ebb and flow of the tide, the new tidelands so affected accrete to the trust. Put otherwise, state law decrees that the surveyable outer boundary of the trust in the area here in controversy is *today's* mean high water line,[9] regardless of the absence of a tidal influence in 1817, of how far inland and remote from the sea, and regardless of how shallow or how insignificant the tidal influence, subject only to the exception discussed in Section VII below. *See O'Neill v. State Highway Department*, 50 N.J. 307, 235 A.2d 1, 9-12 (1967).

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[8]*See generally*, Lowenstein, "The Restive Beaches" 88 *Technology Review* 50-57 (1985); Pilkey, et al, "Rising Seas; Shifting Shores", 15 *Oceans* 65-69 (1982).

[9]For a thoughtful consideration of the use of the mean high water line as a coastal boundary, see Maloney, et al, *The Use and Significance Of The Mean High Water Line In Coastal Boundary Mapping*, 53 No.Car.L.Rev. 185, 243-262 (1974).

VII.

By way of contrast to our law regarding accretion and reliction, boundaries and titles are not affected by avulsion. *Nix v. Dickerson*, 81 Miss. 632, 643, 33 So. 490 (1903); *Anderson-Tully Co. v. Franklin*, 307 F.Supp. 539, 541 (N.D.Miss.1969). It is this general principle that generates doubt regarding at least a part of the Chancery Court's decision, that declaring as the property of the state lands theretofore without the surveyable boundaries of the trust but brought within the ebb and flow of the tide by the dredging for fill material used in construction of Interstate Highway I-10.

An avulsion is a change in a boundary body of water so rapid or sudden, or in such a short time, that the change is directly perceptible or measurably visible at the time of its progress. *Sharp v. Leonard*, 195 Miss. 201, 215, 14 So.2d 218, 220 (1943); *Anderson-Tully Company v. Franklin*, 307 F.Supp. 539, 541-42 (N.D.Miss.1969). We perceive no reason on principle for exclusion from this notion of a change of water course boundary artificially induced by the dredging process.

Put more broadly, under the laws of this state neither artificially created water courses, inlets, slips, marinas and the like, nor physical improvements or alterations made thereto, become a part of the public trust, even though they may become tidally affected. Leaving aside claims of navigation, ingress and egress, title to such artificially created "tidelands," and the beds beneath the waters as well, remains in the record titleholder. Only those lands, not tidelands in 1817, which have become such via the natural process of accretion or the general rising or inland expansion of the tide have in law been added to the trust so that title is held by the State.

For an additional reason, the two lakes created by dredging for fill material used in construction of Interstate Highway I-10 (to the extent that each lake was not naturally within the ebb and flow of the tide on the date the dredging commenced) do not belong to the state. The State has not paid for these lands. To strip these artificially created tidelands from their record title holders would constitute a taking within the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 3, §17, Mississippi Constitution of 1890, which at the very least would require that the state pay just compensation. *See Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

VIII.

Finally, Cinque Bambini argues that the grants and patents under which they hold are entitled to a presumption of validity. In the alternative, the State should in equity be estopped from challenging same.

The first argument is answered by what has been said above. Grants and patents which as a matter of law could convey nothing – because the properties were already in the public trust – are entitled to no presumption of validity. Even those grants and patents which in other contexts may be presumed valid, e.g., *State v. Stockett*, 249 So.2d 388 (Miss.1971), are subject to gain or loss via accretion or reliction.

In support of its alternative theory, Cinque Bambini have called to our attention no case wherein the State of Mississippi has been held estopped; equitably or otherwise, to assert title to and dominion over properties otherwise within the public trust, and our independent research has revaled no such case. Furthermore, the facts presented

here do not support a claim of equitable estoppel. *See, e.g., Chapman v. Chapman,* 473 So.2d 467 (Miss.1985); *PMZ Oil Co. v. Lucroy,* 449 So.2d 201 (Miss.1948).

Moreover, the State's delay in assertion of dominion over these tidelands does not give rise to an estoppel. The State's title may not be lost via adverse possession, limitations or laches. Miss. Const. Art. 4, §104 (1890); *Gibson v. State Land Commissioner,* 374 So.2d 212, 216-17 (Miss. 1979); *Alexander v. Mayor and Board of Aldermen of City of Natchez,* 219 Miss. 78, 94, 68 So.2d 434, 441 (1953); *O'Neill v. State Highway Department,* 50 N.J. 307, 235 A.2d 1, 10 (1967). Under no circumstances may title held by the State for the public use or benefit be so lost. *City of Bay St. Louis v. Board of Supervisors of Hancock County,* 80 Miss. 364, 371, 32 So. 54 (1902); *Bates v. Aven,* 60 Miss. 955, 960-62 (1883).

IX.

Finally, we consider the State's counterclaim which is presented via cross-appeal. In the court below the State sought to recover from Cinque Bambini the value of dirt removed from the bottom of Bayou Enceinte and its adjacent land area in conjunction with the Highway I-10 construction project. From the Chancery Court's denial of this counterclaim, the State appeals.

To the extent that this dirt or fill material may have come from areas today held outside the public trust — see Section VII above, the counterclaim and cross-appeal, of course, must fail. To the extent that this dirt may have come from properties within the trust, we concur with the Chancery Court that the claim must fail for impossibility of proof.

X.

In the proceedings below much technical data regarding surveying methods and the like was presented and considered. The Chancery Court's comprehensive memorandum of decision and final decree necessarily concluded with the establishment of precise, surveyed boundaries separating the properties held by the State in trust from those owned by Cinque Bambini, et al.

This appeal and the assignments of error we have been tendered, however, address only the broad, general principles which must be settled before permanent surveyed or surveyable boundaries may be established. Above we have discussed and tried to make clear the applicable general principles, and in one important particular we have found the Chancery Court in error.

In simpler cases with less at stake, we would finally decide the matter here, viz, we would affirm in part and reverse in part and render. Establishment on the ground and in the land records of the precise outer boundaries of the public trust properties – today – will necessarily involve an interaction between counsel, surveyors and other experts, and the court, an interaction of an extent and nature more compatible with the institutional structure of the Chancery Court than this Court. Accordingly, so much of the final decree below as may be found inconsistent with what we have said above is vacated and the matter is remanded to the Chancery Court for such further proceedings as may be appropriate.

AFFIRMED IN PART: REVERSED IN PART AND REMANDED.
PATTERSON, C.J.; WALKER, P.J.; ROY NOBLE LEE, P.J.; and HAWKINS, DAN M. LEE, PRATHER, SULLIVAN and ANDERSON, JJ., Concur.

MINUTE BOOK,
SUPREME COURT OF MISSISSIPPI MARCH TERM, 1986

WEDNESDAY, MAY 14, 1986:

CINQUE BAMBINI PARTNERSHIP, CARROLL W. ALLEN, LYDIA CARROLL, HAMILTON ALLEN, HARRY B. KELLEHER, SPOONER PETROLEUM COMPANY, AND ENSERCH EXPLORATION, INC. AND PHILLIPS PETROLEUM COMPANY

#55,306

v.

STATE OF MISSISSIPPI AND SAGA PETROLEUM U.S., INC.

This cause having been submitted on the record from the Chancery Court of Hancock County and this Court having considered the same is of the opinion that there is error therein and doth order that the Decree of said Chancery Court rendered in this cause on the 16th day of September, 1982, be and the same is hereby affirmed in part; reversed in part and remanded, all as fully set out in the opinion of this Court. It is further ordered that the appellees do pay all of the costs of this appeal to be taxed.

PHONE: 601/359-3694
601/359-3695
601/359-3696

From The Office Of:
SUE GORDON
Supreme Court Clerk
P.O. Box 117
3rd Floor, Gartin Bldg.
Jackson, MS 39205

July 30, 1986

TO WHOM IT MAY CONCERN

RE: #55,306 Cinque Bambini, etc. v. State

Pursuant to List of Decisions of this Court rendered this date, the Petition for Rehearing filed in above referenced case was denied; however, the original opinion was modified. Attached is a copy of "modified" page 22 of said opinion. Please see that this copy of page 22 is substituted into the copy of the opinion previously furnished you.

Linda Puckett
for
Sue Gordon, Clerk

APPENDIX B

IN THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

CINQUE BAMBINI PARTNERSHIP, ET AL.	)	
Complainants	)	
VS.	)	
	)	
STATE OF MISSISSIPPI, ET AL.	)	
Defendants	)	#14,178
	)	

FINDINGS AND RULING OF THE COURT

This cause of action arises from bill of complaint to quiet and confirm title and to cancel clouds on title filed on December 5, 1978 by the Cinque Bambini Partnership, Carroll W. Allen, Jr., Lydia Carroll, Hamilton Allen, Harry B. Kelleher, Spooner Petroleum Company and Enserch Exploration, Inc. The defendants are State of Mississippi, Saga Petroleum United States, Inc., Marshall Young Oil Company, Public Service Co. of Oklahoma, Elliott Davis, Barry M. Davis, Lee H. Davis, Sagapool U.S. Inc., Union Oil Company of California, Phillips Petroleum Company, Mississippi Power Company, Hancock County, Mississippi, Wesley Haas, James Travinca, Kent Drawerstreet, Mr. and Mrs. Bouce Woods, Melvin Wainwright, Coast Materials Company, South Central Bell Telephone Co., Mississippi State Highway Commission, and any and all parties who have a claim against the real property described in the bill of complaint – some 2400 acres of land.

Separate answers were filed by the South Central Bell Telephone Company, Mississippi State Highway Commis-

sion, Coast Materials Company, Hancock County, Mississippi Power Co., Union Oil Company of California, Phillips Petroleum Company, State of Mississippi (with affirmative defenses), Saga Petroleum and eight other co-defendants (with affirmative defenses), Fred Olsen, Leon Davis, individually and as co-partner D/B/A Davis Bros. and as trustee of Leon Davis Mineral Trust; Elliott Davis, individually and as co-partner D/B/A Davis Bros.; Lee Davis, individually and as co-partner D/B/A Dabro Enterprises; and Barry Davis, individually and as co-partner D/B/A Dabro Enterprises.

The State of Mississippi and Saga Petroleum U.S., Inc. filed demurrers on February 12, 1979, which were denied by the Court on July 24, 1979. The Court's ruling was appealed to the Supreme Court and was affirmed.

The State filed a cross-bill against the Cinque-Bambini partnership, seeking damages for removal of a large quantity of soil from within the boundaries of the subject real property from the Bayou Enceinte area. The partnership had entered into an agreement for sale of construction material with the T.L. James and Co., Inc. in connection with construction of Interstate 10 Highway. Said T.L. James Co. had been employed as general contractor for the work by the Mississippi State Highway Commission. The complainants filed a motion to dismiss or abate the State's cross-bill on April 10, 1981, and the Court sustained the motion to abate. A general demurrer to the cross-bill was also filed on April 10, 1981 and no ruling was made thereon by the Court. The Court, having maturely considered the pleadings, now finds that said demurrer should be overruled, but that the cross-bill now should be dismissed for reasons hereinafter set forth, on the Court's own motion.

This lawsuit was long and vigorously contested, and the Court is of the opinion that a summary of same should be made to place the matter in context.

The object of the suit, in addition to confirming the title of complainants, was to determine ownership of some 600 acres of land which are affected by Coastal tides and which are contained within the same description sought to be confirmed. The land as to which title is involved is bordered on the south by a significant watercourse, Bayou LaCroix. It is bordered on the east by a major watercourse, the Jourdan River. It also has marshes and watercourses in its interior, including two from which Interstate 10 construction sand was dredged by T.L. James & Co. – Bayou Enceinte and Long Gar Bayou.

The land was settled in the 18th and early 19th centuries, and the Crump, Allen and other landowners have since utilized the property.

The lawsuit was triggered as a reaction by complainants to actions of the Mississippi Marine Resources Council employees preparing a map (Exhibit 46) to serve as a guide to "wetlands" in Hancock County. This was part of their function in seeking to implement the Mississippi Coastal Wetlands Protection Act. Said map was filed in the office of the Chancery Clerk of Hancock County, Mississippi. In 1977 the Mississippi Mineral Lease Commission executed oil, gas and mineral leases to Saga Petroleum U.S., Inc., using descriptions taken off the aforesaid map, or "guide." The various leases (Exhibits C-36 to C-39) specified that the leased acreage was owned by the State by virtue of its classification as public trust land. A plat of the property was attached to the complaint (Exhibit 51). Aerial photographs showing the property and its boundaries were introduced as evidence in the trial (Exhibits C-64 and C-138).

The property generally lies on the west bank of the Jourdan River beginning at a point on Mallini Bayou north of the Jourdan River's intersection with Interstate 10. It runs southerly under Interstate 10 and is bounded for the most part on its west side by State Highway 603. Its southern edge is Bayou LaCroix, which flows into the Jourdan River, which itself flows into the Bay of St. Louis, an inlet of the Gulf of Mexico.

The State, Saga Petroleum U.S., Inc. and its assigns claim that any part of the property over which the tide ebbs and flows, up to the mean high water line, is owned by the State under the Public Trust Doctrine – literally – regardless of whether the watercourses were commercially navigable at Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea, and regardless of whether the water be commercially navigable even now.

The cases reveal a multitude of decisions on this subject matter from whence our present law in Mississippi has evolved. The Court has gleaned from local and national cases that three tests have been applied to determine such issues in the past, and they are, briefly: "Navigability in fact," "ebb and flow of the tide," and "navigable capacity." Of the three tests "ebb and flow" is the oldest, having come to us from the common law of England. Federal law is unsettled on the subject, and various states have labored mightily with related problems as the importance of our seacoasts has come into focus.

The complainants (including defendant Phillips Petroleum Co. hereafter for convenience) claim that loose dicta has created wrongful impressions in similar Mississippi cases. They contend that while other Mississippi cases

have followed the public trust doctrine that such cases involved major "navigable" bodies of water or watercourses, all of which were used regularly for navigable purposes at the time Mississippi was admitted into the Union in 1817. The Phillips Petroleum Co. additionally asserted that the established rule in cases such as this would require boundary surveys to be made from headland to headland where a smaller body of water intersects with a larger body of water. The Court has found the case of *Knight v United Land Association,* 141 U.S. 161 (1891) of great interest with reference to the aforesaid "headlands" rule. Largely, however, the complainants maintained throughout the trial and in their argument that navigability in fact is the test which should apply under the facts of this case and they say this is a case of first impression. The complainants have contended throughout that no court of this state, until now, has been called upon to fix the inland reach of the public trust doctrine. If this be so, this court is faced with the proposition of winnowing out the proper test to be applied to the facts of this case and answering the basic issues which are presented; namely, whether the private landowners have title to the subject real property or whether some portion of it is owned by the State under the public trust doctrine; and, secondarily, whether the surveying methodologies and equipment utilized to locate the mean high water line in this case were correct.

In seeking a logical test to apply to the facts of this case the Court has been confronted with ambiguous precedent arising from prior efforts to balance the private interest with the public interest.

No person can question that we live in an advanced technological age today. Examples of this, relative to water navigation, are giant hovercraft which are propelled by fans over water, shallow draft boats propelled by

waterjets, airboats, swamp-buggies, and giant watercraft which run on narrow metal strakes just below the water's surface. Only inches of water can be considered navigable if the above craft are the vessels used for water travel. None of these were in existence until recent years, and most of these were developed after the time of the leading cases in this area of the law. Added to the technological development are heretofore uncontemplated changes, such as increased awareness of the value of the estuarine areas (of which this is one), both from an ecological and environmental point of view. Also, the Tidelands Cases, such as *U.S. v Louisiana*, 363 U.S. 1 (1960) have made us aware that oil, gas and other minerals are found in Coastal areas and have great value. Formerly, our primary Coastal interests were concerned with commerce and navigation by the craft of the day (ranging from pirogues and flatboats to great seagoing vessels), recreation, fishing of all kinds, and dredging of sand, shells and the like. Whole new concepts of sea agriculture and mining are coming into being, and Coastal areas are invariably involved. Our courts thus cannot ignore the present day realities of life and create an arbitrary or unbending test, or tests, in attempting to solve water problems. It is recalled that it was necessary for the courts to invent the "navigability in fact" test (as in *Culley v Pearl River Industrial Commission*, 108 So.2d 390 (1959)) in order to extend the jurisdiction of admiralty cases and the regulation of commerce to fresh water streams and bodies of water. If we allowed such tests to assume rigidity in the law we would inevitably confront different conceptual problems, which could and can be avoided in salt water cases by resort to the uncomplicated test of "ebb and flow." This test appears implanted in the law of our state and as interpreted is flexible enough to allow the legislature of the state to effectively deal with state-owned waterbottoms and tidelands when a proper

case is presented (See *Treuting v Bridge and Park Commission of Biloxi,* 199 So.2d 627 (Miss. 1967).).

This Court is of the opinion, and so finds, that the "ebb and flow" test is the appropriate one for application in this case. Further, that the inland reach of the public trust doctrine is to that horizontal line located at the intersection of the land with the water surface at the elevation of mean high water, wherever the tide ebbs and flows; and that said inland reach is determined in this case by the O'Hargan-Smith-Cole survey as combined.

Examination of the exhibits in this case which show the location of early land grants (Exhibit S-50, etc.) reveals that each of them was located on, near, or had access to a watercourse capable of floating shallow draft watercraft. The patents or grants creating these holdings make no specific references to small streams, inlets or bayous located therein. The term "bayou" was in vogue in those days and it was been defined as an offshoot of a river, an outlet of a lake, a small river or creek. *Richardson v State,* 91 SW 758-59. The term was also used in the Act of Congress dated March 3, 1811, §5, 2 Stat. 663, to mean "a channel through which commerce could be carried on by water." See *Surgett v. LaPice,* 12 L.Ed. 982 (1850). Several disputed puted watercourses in this lawsuit are called bayous. Even without reference to the ebb and flow test the Court finds there is sufficient evidence to indicate that the watercourses known as Bayou LaCroix, Bayou Enceinte, and Bayou Mallini were navigable waters or navigable in fact in 1817 since they carried commerce or were capable of doing so with reasonable improvements of the nature contemplated in *U.S. v. Appalachian Electric Power Co.,* 311 U.S. 377 (1940). There is no dispute as to the navigability of the Jourdan River. All the above watercourses have had tugs and barges plying their waters for many years, along

with pleasure and fishing craft. Each of them have provided safe haven for the various vessels of the Gulf Coast area during hurricane season. Long Gar Bayou has no demonstrated commercial history but it has been made more navigable, as has been Bayou Enceinte, by extensive dredging operations in an operation which was itself commercial. All of the aforesaid watercourses would today be classified navigable in fact according to federal admiralty jurisdiction and federal regulation of commerce. (See 1 *Benedict on Admiralty*, §141, (7th Ed. 1974), and *U.S. v Twin City Power Co.*, 100 L.Ed. 240 (1956).) This Court finds that all rivers and bayous designated as such in this lawsuit are navigable in fact at the present time, and that such water courses had navigable capacity in 1817.

This Court further finds that the cross-bill of the State of Mississippi should be dismissed because it would be next to impossible to reconstruct the amount of construction soil removed from Bayou Enceinte and Long Gar Bayou. The Court, having heard testimony and having considered other evidence in trial for more than a month, is of the opinion that it would be inordinately expensive to establish underwater lines of demarcation between the public trust land and privately owned land and to further extend trial of this case. It has been demonstrated conclusively that above-water proceedings are expensive since more than $300,000.00 was spent on surveys connected with this case. The legislature would be required to appropriate money to make such underwater explorations, and state engineers then would be required to compute the amounts of soil removed. This Court finds that all parties acted in good faith in contracting for use of the soil, and that the transaction should be closed without further legal action. The Court considers that the people of Mississippi

benefitted greatly by getting the construction material which was needed by the State Highway Department. The complainants benefitted by the sum paid, plus the advantages gained by having deep water to enhance their littoral and riparian rights. Such private littoral and riparian rights are unaffected by this ruling and they continue in full force and effect as the private property of the landowners, subject to navigational and commerce servitudes imposed by law. One reason for holding the "ebb and flow" test applicable to the circumstances of this case is that the mean high water line is the federal standard for littoral boundaries, as in Mississippi. The federal common law recognizes ambulatory boundaries, that is, tidal boundaries wherein the physical location of the mean high water line may shift because of natural or artificial changes in the shoreline. Littoral owners may gain or lose land; but normally, changes in the shoreline which occur suddenly and perceptibly do not result in a change of boundary or ownership. (See *Municipal Liquidators, Inc. v Trench*, 153 So.2d 728-30 (Fla. 1963).)

In this case it is obvious that some privately owned land was taken along with some public trust land, the amounts of which are unknown; but the Court finds that complainants are in no position to complain. As a basis for this finding the Court further finds that such taking was with the full consent and knowledge of all the complainants and that each participated by receipt of compensation according to their individual interest. There was no formal court condemnation, but since all parties of interest were joined in the transaction or were represented by an agent with their implied approval and knowledge, the complainants should be estopped from later claiming additional compensation for the taking of their private property. (See *Kaiser Aetna, et al. v United States*, 444 U.S. 164, 62

L.Ed.2d 332, 100 S. Ct. 383 (1979).) Proceeding further under the cross-bill would not be in the best interest of Mississippi taxpayers and would be inequitable to complainants. Because of the foregoing reasons, this Court concludes and finds that an order should be entered dismissing the cross-bill filed by the State of Mississippi at this time.

Another issue attempted to be raised during the course of the trial was that of the public's right of surface access for fishing and related uses wherever the tide ebbs and flows. The public's "right of pescary" (fishing) exists in all such areas. Such rights were settled by *Magna Charta*. Thereafter the common law rule was and is that ". . . all the subjects of the realm have a right to fish in the sea or any creek thereof or any tide river, the shore and soil of which place of fishing belong to the king or to the lord of the manor." S. Moore, *A History of the Foreshore*, 722 (1888), annotating Hall's *Essay*. The right to fish is vested in the public wherever the tide flows and reflows and irrespective of who owns the bottoms. This easement follows the tides. Moreover, the public has acquired recreational, transportational, fishing and other water sport rights in the waters involved in this lawsuit through the common law doctrines of custom and prescription. *State ex rel. Thornton v Hay*, 462 P.2d 671, 677 (Ore. 1969), and *United States v St. Thomas Beach Resorts, Inc.*, 386 F.Supp. 769, 773 (D.V.I. 1974). The Court finds that the public's right to fish in the disputed area is in no danger.

The complainant's record title (as defined by the plat Exhibit C-51, annexed as ENCLOSURE 1 immediately following as the next page) and continuous occupation and usage is not at issue. Both the State and Saga stipulated to these facts (Bush Affidavit, Exhibit C-43; Ex-

hibits 25, 25A, 26 and 26A). Therefore, a lengthy discussion of the chain of title is not necessary. The Court finds that the pertinent background facts relating to title, characteristics and usage of the land and the State's acts that caused this suit to be filed are as stated below.

John J. Jourdan, Noel Jourdan and Pierre Carco settled and claimed most of the subject property prior to April 15, 1813, while these lands were under Spanish Government (See areas B, E, R and G on Exhibit C-51). In order to clearly define private boundaries in the newly-acquired territory which had previously been a part of Spanish West Florida, the United States Congress on March 3, 1819, enacted "An Act for adjusting the claims to land, and establishing land offices, in the districts east of the island of New Orleans." Noel Jourdan, John J. Jourdan and Pierre Carco presented their respective land claims and these claims were duly surveyed by Major Elihu Carver, United States Deputy Surveyor (Exhibits C-40, 170 & 171). The John J. Jourdan Claim No. 23, the Noel Jourdan Claim No. 28, and the Pierre Carco Claim No. 25 were confirmed by an express act of Congress dated May 8, 1822, entitled "An Act supplementary to the several acts for adjusting the claims to land, and establishing land offices, in the districts east of the island of New Orleans." The John J. Jourdan Claim No. 8 (also referred to as Claim No. 3) was confirmed by Act of Congress dated May 28, 1830, entitled "An Act to confirm certain claims to lands in the district of Jackson Courthouse, in the State of Mississippi." The United States and the State of Mississippi subsequently issued patents on each of these claims (Bush Affidavit Exhibit C-43).

According to the testimony of Dr. Smith (of Advanced Development Co.) and the official patents, the 1827 town-

ship plat, page 3 of Exhibit C-40, is the official plat for the John J. Jourdan Claim No. 23 and the Noel Jourdan Claim No. 28. The official township plat for the John J. Jourdan Claim No. 8, which was surveyed and approved in 1830, is the 1843 plat, page 4, Exhibit C-40.

All other parts of the subject property were granted to private individuals through subsequent claims, swampland patents or other patents from the state and federal governments during the 1800s. By the turn of the century in 1900 all of the subject property was held privately, the vast majority of which was settled and in the private sector by 1830 (Bush Affidavit Exhibit C-43 and deraignment of title attached thereto; Exhibits C-1 through C-24A).

In the years 1925 and 1926, Dr. Carroll Allen acquired title to all of the subject property from successors in title to the original settlers, the Jourdans, Pierre Carco and others. James L. Crump acquired title to this property in 1946 from the heirs of Dr. Allen. Dr. Allen's heirs reserved a one-half interest in the minerals, which interest is now owned by the surviving heirs, his son and daughter, Lydia Allen and Carroll Allen, Jr., who are complainants.

On July 25, 1947, James Crump conveyed a small parcel of this land to Harry B. Kelleher, who is a complainant herein.

James L. Crump died testate in 1963, and after the expiration of certain trust provisions the property vested in 1971 in his nieces and nephews, Evelyn Crump Johnson, Helen Crump Cutler, Joseph R. Crump, Armand B. Crump and Donald E. Crump. On November 25, 1973, the nieces and nephews conveyed the title to the complainant, the Cinque Bambini Partnership, which they wholly own and control.

The grants and the patents dating from the early nineteenth century purport to place into private ownership all of the inland area. From the earliest date all of the land inside the grants and patents has been sold as private property without any attempt to except, meander or otherwise take note of the interior streams (See Deeds to Allen, Exhibits C-30 through 35; Deed to Crump, Exhibit C-29; and deraignment of title in general, Exhibit C-43). The landowners have for over 150 years paid taxes on the entire acreage in these claims and grants.

Fritz Harris, the farm manager for the Crump family since 1952, testified that the land had been used for various agricultural uses over the years, including raising timber, rice, clover and, in the upland areas, soybeans. At one time before Highway I-10 was built, James L. Crump used this area for pasture for four hundred head of cattle. Each winter the marsh grass was burned off to provide good spring and early summer grazing for the cattle down to the water's edge. The cattle often grazed down to the edge of the Jourdan River and Bayou LaCroix and drank water from both the river and the bayou. The saltiness of the water depended on the state of the tide, recent rains, wind conditions, and the like.

So far as the interior drainage streams are concerned, Mr. Harris stated that he occasionally saw a fisherman on one or two of them, but that was rare. Mr. Harris stated that the Crump family had always paid taxes on the entire area and that to his knowledge no one had ever questioned the Crumps' ownership until the Mississippi Marine Resources Council (MMRC) filed its maps in the County Courthouses in Hancock, Harrison and Jackson Counties purporting to define the Wetlands area (Exhibit C-46).

When the Mississippi Legislature enacted the Coastal Wetlands Protection Law in 1973, Miss. Code Ann. 49-

27-1 *ET SEQ.*, §49-27-5 defined "Coastal Wetlands" as follows:

> "§49-27-5. Definitions.
>
> (a) *'Coastal wetlands'* means all *publicly owned lands* subject to the ebb and flow of the tide; which are *below the watermark of ordinary high tide;* all publicly owned accretions above the watermark of ordinary high tide and all publicly owned submerged water-bottoms below the watermark of ordinary high tide.
>
> (b) The term 'coastal wetlands' shall be interpreted to include the flora and fauna on the wetlands and in the wetlands." (Emphasis added.)

The Act provided, among other things, that the Mississippi Marine Resources Council should prepare charts showing the distribution of the "Coastal Wetlands" and file them in the Chancery Clerk's office for each county affected. The specific language of the statute is as follows:

> "§49-27-65. Evaluation of coast wetlands – charts – overall use plan.
>
> (a) In order to implement the policy set forth in the chapter and to assist the commission in protection of coastal wetlands, the council acting with the cooperation and assistance of the Gulf Regional Planning Commission and the Gulf Coast Research Laboratory shall evaluate the coastal wetlands and prepare charts at an appropriate scale showing the distribution of coastal wetlands as defined in this chapter. These charts will be provided to the offices of the chancery clerk of affected counties and to the Gulf Regional Planning Commission. The charts will be updated and reissued periodically as need-

ed to provide a current inventory of coastal wetlands."

According to Joe Gill, who is charged with supervision of the Coastal Wetlands Law, after the foregoing statutes were adopted members of the MMRC met with members of the Gulf Regional Planning Commission and the Gulf Coast Research Laboratory to define the extent of the wetlands. They took maps which had been prepared by the Gulf Regional Planning Commission and "eyeballed" the areas in each county which they felt should be in the wetlands. Mr. Gill acknowledged that no survey was made and that no tidal data was collected or used in the mapping process. Nevertheless, these maps were recorded in the Chancery Clerks' offices in the three coastal counties as the official coastal wetlands charts or maps.

Both Mr. Lewis and Mr. Gill stated that they had never represented that these maps accurately defined the publicly owned lands and each stated the MMRC used them for jurisdictional purposes only. Since their jurisdiction by statute is limited to the publicly owned lands, the maps alone created a cloud on complainants' title. However, the more serious problem arose when the Mississippi Mineral Lease Commission used these same maps to lease minerals. Mr. Gill and Mr. Lewis both stated that they told the Mineral Lease Commission that these maps were not to be used for title purposes. But they both agreed that, notwithstanding their warning, the Mineral Lease Commission did use their "eyeballed" wetlands map for leasing. The result was that in 1977 Saga was granted the aforesaid leases (Exhibits C-36, 37, 38 and 39) which purported to lease state-owned lands only, but which obviously granted the right to explore for and develop and produce minerals on approximately 600 acres of the land within the complainants' land lines. All four leases were recorded in the

Chancery Clerk's office in Hancock County (Oil and Gas Book 32 at pages 575, 577, 579 and 585). The encroachment is vividly shown by the red line overlay prepared by Dr. Smith (Exhibit C-64A).

According to the testimony of Mr. Joseph Crump, after the complainants learned about the leases to Saga they contacted representatives of the State to find out what was going on. They soon learned that the State was claiming this 600 acres.

Complainants, Cinque Bambini Partnership, conducted boundary surveys of the lands involved in this lawsuit, including those areas adjacent to the Jourdan River, Bayou LaCroix, and other bayous and inlets, and these surveys were conducted with the use of conventional land surveying procedures, marine surveying techniques, and photogrammetric surveying procedures and techniques to determine the boundaries of the property which is the subject of this lawsuit.

Defendants, State of Mississippi and Saga Petroleum U.S. Inc., et al., conducted boundary surveys of the eastern and southern portions of the lands adjacent to the Jourdan River, Bayou LaCroix, and other bayous and inlets, the subject of this lawsuit, and these surveys were conducted with the use of conventional land surveying procedures, marine surveying techniques and photogrammetric surveying procedures and techniques. Photogrammetric surveying is surveying by making measurements on photographs.

After considerable testimony and evidence it became apparent that the results of the conventional land surveying procedures, the results of the marine surveying techniques, and the results of the photogrammetric surveying procedures were very similar and that the subsequent location

by both parties of mean high water points on the land surveyed by the above methods were practically identical. The surveying techniques utilized were very accurate and acceptable in establishing a mean high tide line adjacent to the complainants' lands. As a result these parties, with the exception of Phillips Petroleum Company, entered into a stipulation that the mean high water points, as shown on Exhibit C-64, were properly located as mean high water points and were originally identified as 2x4 orange stakes. This stipulation did not preclude the question of tidal waters being present in other areas of inlets and bayous, nor did it conclude that there were no other survey points located as mean high water points along the inlets and bayous adjacent to this property.

Complainant, Cinque Bambini Partnership, is the owner of the surface and an undivided one-half (½) interest in all lands described in Exhibit S-258 (attached in part as Addendum 1), less and except the following parcels which are below the ebb and flow of the tide and therefore vested in and held in trust by the State of Mississippi:

Parcel 8 (Exhibit S-258 at p. 8; plat introduced as Exhibit S-262), containing 0.679 acres, more or less;

Parcel 7 (Exhibit S-258 at p. 9; plat introduced as Exhibit S-264), containing 4.247 acres, more or less;

Parcel 6 (Exhibit S-258 at p. 10; plat introduced as Exhibit S-261), containing 0.083 acres, more or less;

Parcel 5 [excluding that area covered within Parcel 5A], (Exhibit S-258 at pp. 11-14; plat introduced as Exhibit S-266), containing 5.82 acres, more or less;

Parcel Stenum (From testimony of Lugene P. Stenum on August 28, 1981, and identified in orange

by the initials L.P.S. and date on Exhibit S-175), containing 0.44 acres, more or less;

Parcel 5A (Exhibit S-258 at p. 15), containing 98.00 acres, more or less;

Parcel 4 (Exhibit S-258 at p. 16; plat introduced as Exhibit S-260), containing 0.968 acres, more or less;

Parcel 3C (Exhibit S-258 at p. 17; plat introduced as Exhibit S-263), containing 1.282 acres, more or less;

Parcel 3B (Exhibit S-258 at p. 18; plat introduced as Exhibit S-263), containing 0.583 acres, more or less;

Parcel 3A (Exhibit S-258 at p. 19; plat introduced as Exhibit S-263), containing 0.855 acres, more or less;

Parcel 2C (Exhibit S-258 at p. 20; plat introduced as Exhibit S-265), containing 13.232 acres, more or less;

Parcel 2B (Exhibit S-258 at p. 21; plat introduced as Exhibit S-265), containing 2.208 acres, more or less;

Parcel 2A (Exhibit S-258 at pp. 22-23; plat introduced as Exhibit S-265), containing 9.966 acres, more or less;

Parcel 1A (Ex. S-258 at p. 25) containing 2.5 acres more or less;

and less and except the Kelleher tract described below, and less and except the surface tract of Mississippi Power Company described below, and subject to the oil, gas and mineral leases, surface easements, unrecorded surface

leases set forth in the Bill of Complaint, and right-of-ways and pooling declarations reflected by the public records as they may apply. The paragraphed parcels referred to above are graphically depicted on photographic Exhibits S-174, S-175 and S-176 with overlays.

Addendum 1 (Exhibit S-258 in part) contains a complete description of the property in question. Parcel 1A (Exhibit S-258 at p. 25) consists of a bayou which is subject to the ebb and flow of the tide and empties into Bayou LaCroix. Parcel 1A describes this bayou as most of it existed prior to its alteration by dredging. The remainder of this bayou is included in this description as it has been dredged at its lower end.

Parcel 5A (Exhibit S-258 at p. 15), which overlaps with Parcel 5, consists of the remains of Bayou Enceinte and the remains of Long Gar Bayou, and also includes the dredged lakes and connecting canals as they presently exist. Parcel 5 (Exhibit S-258 at p. 11; plat introduced as Exhibit S-266) consists of Bayou Enceinte and Long Gar Bayou as they existed prior to the dredging of the lakes and connecting canals which now exist. The original entrance and channel of Bayou Enceinte, which has been filled and lies between the Jourdan River and Parcel 5A, is included as part of Parcel 5 but not of Parcel 5A. Although Parcel 5 is overlapped by Parcel 5A in all areas except that portion of the original channel which has been filled, Parcel 5 is included in order to include the old original channel which was filled. The original entrance and channel of Bayou Enceinte which is now filled constitutes 5.82 acres, more or less.

Parcels 5 and 5A are excepted from the lands described as belonging to the complainants since the parcels are subject to the ebb and flow of the tide. Also excepted from the

lands belonging to the complainants is that area at the upper reaches of Bayou Enceinte which is subject to the ebb and flow of the tide as testified to by Lugene P. Stenum in his testimony on August 28, 1981, and identified in orange by the initials L.P.S. and date on Exhibit S-175. Such area constitutes .44 acres, more or less.

Complainant, Harry B. Kelleher, is the owner of the surface and an undivided one-half (½) mineral interest in the following described land, less and except any part below the mean high tide and therefore owned and held as trust property by the State of Mississippi and described below, situated in Hancock County, Mississippi, as follows:

> That tract of land comprising part of the John J. Jourdan Claim No. 23 and part of Section 4 described as follows:
>
> Beginning at an iron stake set 23 feet North of the corner of Sections 54/89, of Township 8 S. Range 14 W., (said section corner also being the upper northwest corner of the Noel Jourdan Claim); thence ing N. 52° W. 642 feet to an iron stake set on the eastern line of the public road; thence northerly along said road 2050 feet, more or less, to fork of roads; thence easterly along the southern line of the right fork of said road 910 feet, more or less, to the eastern line of the J.J. Jourdan Claim; thence along said claim line S. 12° E. 523 feet to an iron stake set for the southwest corner of land of Birghenti, where the line between Lots 1 and 2 of the divison of John J. Jourdan Claim intersects said claim line; thence east 300 feet, more or less, to the East bank of Jourdan River; thence southerly, along the meanderings of said river to a point 23 feet North of the section line between Sections 4 & 9; thence West to the place of beginning. Being a part of the J.J. Jourdan Claim

and a part of Lot No. 5 of fractional Section 4; all in Township 8 S. Range 14 West in Hancock County, Mississippi; less and except that 1.83 acre tract described as follows:

Beginning at an iron stake set 23 feet north of the corner of Sections 5, 4, 8 and 9 of Township 8 South, Range 14 West (said section corner also begin the upper northwest corner of the Noel Jourdan claim); thence running North 52° West 510.3 feet to an iron stake for a fence corner; thence running South 75° 10' East 434.9 feet along the fence to an iron stake set at an angle in the fence; thence running South 59° 40' East 400.2 feet along the fence to an iron stake at a fence corner; thence running West 363.4 feet to the point of beginning.

The title of Kelleher is subject to the oil, gas and mineral lease, easements and right-of-ways and pooling declarations reflected by the public records, as they may apply.

Complainants, Carroll W. Allen Jr. and Lydia Carroll Hamilton Allen, each own an undivided one-fourth (¼) mineral interest in all lands described in Addendum 1 (Exhibit S-258 in part), less and except the following parcels which are below the ebb and flow of the tide and therefore vested in and held in trust by the State of Mississippi:

Parcel 8 (Exhibit S-258 at p. 8; plat introduced as Exhibit S-262), containing 0.679 acres, more or less;

Parcel 7 (Exhibit S-258 at p. 9; plat introduced as Exhibit S-264), containing 4.247 acres, more or less;

Parcel 6 (Exhibit S-258 at p. 10; plat introduced as Exhibit S-261), containing 0.083 acres, more or less;

Parcel 5 [excluding that area covered within Parcel 5A], (Exhibit S-258 at pp. 11-14; plat intro-

duced as Exhibit S-266), containing 5.82 acres, more or less;

Parcel Stenum (from testimony of Lugene P. Stenum on August 28, 1981, and identified in orange by the initial L.P.S. and date on Exhibit S-175), containing 0.44 acres, more or less;

Parcel 5A (Exhibit S-258 at p. 15), containing 98.00 acres, more or less;[1]

Parcel 4 (Exhibit S-258 at p. 16; plat introduced as Exhibit S-260), containing 0.968 acres, more or less;

Parcel 3C (Exhibit S-258 at p. 17; plat introduced as Exhibit S-263), containing 1.282 acres, more or less;

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[1]Parcel 5a (Exhibit S-258 at p. 15); which overlaps with Parcel 5, consists of the remains of Bayou Enceinte and the remains of Long Gar Bayou, and also includes the dredged lakes and connecting canals as they presently exist. Parcel 5 (Exhibit S-258 at p. 11; plat introduced as Exhibit S-266) consists of Bayou Enciente and Long Gar Bayou as they existed prior to the dredging of the lakes and connecting canals which now exist. The original entrance and channel of Bayou Enciente, which has been filled and lies between the Jourdan River and Pacel 5A, is included as part of Parcel 5 but not of Parcel 5A. Although Parcel 5 is overlapped by Parcel 5A in all areas except that portion of the original channel which has been filled, Parcel 5 is included in order to include the old original channel which was filled. The original entrance and channel of Bayou Enceinte which is now filled constitutes 5.82 acres, more or less.

Parcels 5 and 5A are excepted from the lands described as belonging to the complainants since the parcels are subject to the ebb and flow of the tide. Also excepted from these lands belonging to the complainants is that area at the upper reaches of Bayou Enceinte which is subject to the ebb and flow of the tide as testified to by Lugene P. Stenum in his testimony on August 28, 1981, and identified in orange by the initials L.P.S. and date on Exhibit S-175. Such area constitues .44 acres, more or less.

Parcel 3B (Exhibit S-258 at p. 18; plat introduced as Exhibit S-263), containing 0.583 acres, more or less;

Parcel 3A (Exhibit S-258 at p. 19; plat introduced as Exhibit S-263), containing 0.855 acres, more or less;

Parcel 2C (Exhibit S-258 at p. 20; plat introduced as Exhibit S-265), containing 13.232 acres, more or less;

Parcel 2B (Exhibit S-258 at p. 21; plat introduced as Exhibit S-265), containing 2.208 acres, more or less;

Parcel 2A (Exhibit S-258 at pp. 22-23; plat introduced as Exhibit S-265), containing 9.966 acres, more or less;

Parcel 1A (Exhibit S-258 at p. 25), containing 2.5 acres, more or less;

and subject to the oil, gas and mineral leases, easements, right-of-ways and pooling declarations reflected by the public records, as they may apply. The numbered parcels referred to above are graphically depicted on photographic Exhibits S-174, S-175 and S-176 with overlays.

The Mississippi Power Company is the owner of the surface of the following described land situated in Hancock County, Mississippi, pursuant to the terms of its deed of record, to-wit:

A tract in the Pierre Carco Claim No. 25 described as follows:

Commence at the Northwest corner of the Pierre Carco Claim No. 25 and run South 75° 14' West 397.9 feet to an iron rod for the point of beginning; thence running South 12° 54' East 300 feet to an iron rod; thence South 77° 06' West to an iron rod in the East

boundary of the Bay-Kiln Road; thence along said road North 6° 49' East 236.8 feet; thence continuing along said road North 10° 14' East 84.4 feet to an iron rod; thence North 77° 06' East 300 feet, more or less, to the point of beginning, containing 2.45 acres, more or less (Book H-8, Page 454).

Title to the foregoing lands shall be confirmed and quieted in and to said owners.

The following lands are below the mean high tide line and are subject to the ebb and flow of the tide, and title to these lands is vested in the defendant, State of Mississippi, as a sovereign state in trust for all of its people. The numbered parcels referred to below are graphically depicted on photographic Exhibits S-174, S-175 and S-176 with overlays. The State of Mississippi is the owner of the surface and all mineral interests in the lands described by the following:

Parcel 8 (Exhibit S-258 at p. 8; plat introduced as Exhibit S-262), containing 0.679 acres, more or less;

Parcel 7 (Exhibit S-258, p. 9; plat introduced as Exhibit S-264), containing 4.247 acres, more or less;

Parcel 6 (Exhibit S-258 at p. 10; plat introduced as Exhibit S-261), containing 0.083 acres, more or less;

Parcel 5 [excluding that area covered within Parcel 5A], Exhibit S-258 at pp. 11-14; plat introduced as Exhibit S-266), containing 5.82 acres, more or less;

Parcel Stenum (From testimony of Lugene P. Stenum on August 28, 1981, and identified in orange by the initials L.P.S. and date on Exhibit S-175), containing 0.44 acres, more or less;

Parcel 5A (Exhibit S-158 at p. 15), containing 98.00 acres, more or less;[2]

Parcel 4 (Exhibit S-258 at p. 16; plat introduced as Exhibit S-260), containing 0.968 acres, more or less;

Parcel 3C (Exhibit S-258 at p. 17; plat introduced as Exhibit S-263), containing 1.282 acres, more or less;

Parcel 3B (Exhibit S-258 at p. 18; plat introduced as Exhibit S-263), containing 0.583 acres, more or less;

Parcel 3A (Exhibit S-258 at p. 19; plat introduced as Exhibit S-263), containing 0.855 acres, more or less;

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[2]Parcel 5a (Exhibit S-258 at p. 15), which overlaps with Parcel 5, consists of the remains of Bayou Enceinte and the remains of Long Gar Bayou, and also includes the dredged lakes and connecting canals as they presently exist. Parcel 5 (Exhibit S-258 at p. 11; plat introduced as Exhibit S-266) consists of Bayou Enciente and Long Gar Bayou as they existed prior to the dredging of the lakes and connecting canals which now exist. The original entrance and channel of Bayou Enciente, which has been filled and lies between the Jourdan River and Pacel 5A, is included as part of Parcel 5 but not of Parcel 5A. Although Parcel 5 is overlapped by Parcel 5A in all areas except that portion of the original channel which has been filled, Parcel 5 is included in order to include the old original channel which was filled. The original entrance and channel of Bayou Enceinte which is now filled constitutes 5.82 acres, more or less.

Parcel 5 and 5A are excepted from the lands described as belonging to the complainants since the parcels are subject to the ebb and flow of the tide. Also excepted from the lands belonging to the complainants is that area at the upper reaches of Bayou Enceinte which is subject to the ebb and flow of the tide as testified to by Lugene P. Stenum in his testimony on August 28, 1981, and identified in orange by the initials L.P.S and date on Exhibit S-175. Such area constitutes .44 acres, more or less.

Parcel 2C (Exhibit S-258 at p. 20; plat introduced as Exhibit S-265), containing 13.232 acres, more or less;

Parcel 2B (Exhibit S-258 at p. 21; plat introduced as Exhibit S-265), containing 2.208 acres, more or less;

Parcel 2A (Exhibit S-258 at pp. 22-23; plat introduced as Exhibit S-265), containing 9.966 acres, more or less;

Parcel 1A (Exhibit S-258 at p. 25), containing 2.5 acres, more or less;

Subject to oil, gas and mineral leases in favor of Saga Petroleum U.S. Inc., and assignments thereof in Exhibits S-172 and S-173 and other assignments as disclosed by the public records, as said leases are recorded in Oil, Gas and Lease Records of Hancock County, Mississippi in Book 30 at Page 500, Book 32 at page 575, Book 32 at Page 577, Book 32 at Page 479, and Book 32 at Page 585, together with all pooling declarations reflected by the public records.

The oil, gas and mineral leases referred to in the above paragraph cover and affect only the lands described in said paragraph, and each of the leases issued to Saga Petroleum U.S. Inc. contained the following described language: "All State-owned lands subject to the ebb and flow of the tide and which are below the water mark of ordinary (mean) high tide." None of these leases cover and affect any other lands described in the Bill of Complaint and to the extent that they may purport to do so they are null and void and of no effect.

Testimony showed water bottoms subject to the ebb and flow of the tide up to mean high tide have long been con-

sidered by local boaters, fishermen and individuals involved in recreation to belong to the State and not to any private individual.

A weir was constructed across the channel of Bayou Enceinte which hindered the navigation along that channel. After its construction the weir was damaged by explosives and partly destroyed.

A Special Borrow Pit Lease Agreement was executed on September 18, 1967 between the Estate of James L. Crump and the T.L. James & Company, Inc. for the removal of dirt and fill material from Bayou Enceinte and Long Gar Bayou and adjacent Crump property. The State of Mississippi was not a direct party to that lease agreement nor was such a lease agreement authorized by an act of the Mississippi Legislature or other appropriate body on behalf of the State of Mississippi.

The original bed of Bayou Enceinte and Long Gar Bayou has been substantially altered by a dredging operation conducted by T.L. James & Company, Inc. under a Special Borrow Pit Lease Agreement dated September 18, 1967, entered into with the Estate of James L. Crump which owned the upland property adjacent to the original channel of Bayou Enceinte and Long Gar Bayou.

The Mississippi State Highway Department contracted with T.L. James & Company, Inc. for the construction of Interstate 10 through Hancock County. The Mississippi State Highway Department is not the State's representative in tideland matters. There is no power or authority vested in the Mississippi State Highway Department to sell or lease tidelands held in trust by the State of Mississippi.

A substantial amount of dirt was removed from the original bed of Long Gar Bayou and Bayou Enceinte and

from adjacent upland property next to those bayous, thereby lowering those adjacent properties to such a level that the portions as lowered are covered by the ebb and flow of the tide, as was the original channel of the two bayous both prior to and after the dredging operation. No permission or authority was granted by the Mississippi Legislature or other appropriate body on behalf of the State of Misssissippi for the dredging of the original channel of the two bayous.

The original mean high watermark on the banks of Bayou Enceinte and Long Gar Bayou has been obliterated and destroyed during the dredging activities conducted by T.L. James & Company, Inc. under the Special Borrow Pit Lease Agreement.

The mouth of the original channel of Bayou Enceinte was filled during the dredging operation by the T.L. James & Company, Inc. pursuant to the Special Borrow Pit Lease Agreement dated September 18, 1967. Property constituting the original channel which was below mean high tide was filled in to the exclusion of the ebb and flow of the tide. No permission or authority was granted by the Mississippi Legislature or other appropriate body on behalf of the State of Mississippi for the filling in of the mouth of the original channel of Bayou Enceinte.

A new artificial channel was constructed for the mouth of Bayou Enceinte which resulted in property originally owned by the Crumps being lowered below the level of mean high tide. This construction was performed by the T.L. James & Company, Inc. pursuant to the Special Borrow Pit Lease Agreement dated September 18, 1967.

The interior bayous, inlets and streams denoted in Exhibits S-258 at pages 15 and 25, S-260, S-261, S-262, S-263, S-264, S-265 and S-266, which were within the pro-

perty the subject of this lawsuit, contain waters navigable by fishing vessels, recreational boating vessels, and other vessels; and the beds of the interior bayous, inlets, and streams are below mean high tide and are subject to the ebb and flow of the tide.

The State of Misssissippi at no time conveyed by legislative act the submerged lands subject to the ebb and flow of the tide which are the subject of this suit to the complainants. No individual or agency of the Government of the State of Mississippi, including the State Land Commissioner, was authorized to convey any part of land held in trust by the State of Mississippi subject to the ebb and flow of the tide to private individuals for private purposes.

No evidence was introduced which clearly proved that title to submerged lands below the ebb and flow of the tide in the area the subject of this lawsuit was ever conveyed to private individuals by any grant or conveyance.

The National Ocean Survey, National Oceanic and Atmospheric Administration, United States Department of Commerce, is the acknowledged authority in the United States with respect to mean high tide readings.

The State of Mississippi utilized a highly technical and sophisticated technique of photogrammetry to conduct its survey, along with examination of vegetation and on-the-ground measurement. Such photogrammetric technique is utilized by the United States Government in the targeting of advanced missiles and can be accurately utilized to survey the boundary lines of property which is adjacent to submerged lands subjected to the ebb and flow of the tide.

For purposes of uniformity in establishing tidal datums and mean high water lines, a standard tidal epoch is designated by the National Ocean Survey, National Oceanic

and Atmospheric Administration, United States Department of Commerce. An 18.6 year cycle is required for the purpose of establishing a Tidal Datum Epoch, as this is the period of time required for the moon to make a 360 degree revolution of the earth in its orbit. It was undisputed at the trial that the National Ocean Survey (NOS) is the recognized authority for this purpose.

Two different Tidal Datum Epochs were furnished by the National Ocean Survey to the parties conducting their surveys. The complainants began their survey with one Tidal Datum Epoch in effect (Exhibit C-66). The National Ocean Survey, during the normal course of business, implemented by publication at 45 Federal Register 70296 and 70297 (October 23, 1980), a new Tidal Datum Epoch (Exhibit C-113). This second, or new epoch, which was in effect and in the place of the old epoch utilized by complainants, was utilized by the State in its survey. The difference between the use of those two epochs was found to be insignificant with respect to the results obtained. Both parties used the Tidal Datum Epoch in effect on the date of the initiation of their surveys. Utilization of the Tidal Datum Epoch in effect is a proper method to be used in surveys of this type.

In August 1977 the State of Mississippi entered into a Cooperative Agreement with the National Ocean Survey for a tidal datum survey for the State of Mississippi. Under this agreement the National Ocean Survey's permanent tidal gauge at Pensacola, Florida was utilized along with one at the Bay-Waveland Station at Waveland, Mississippi, together with other secondary tidal gauge stations of lesser duration in the area of the lands involved in this lawsuit. After tide gauge information was recorded at these stations all of this information was transmitted to the National Ocean Survey and processed by that agency

under the Cooperative Agreement and subsequently utilized by the surveyor for the complainants and by the surveyor for the State of Mississippi. It was undisputed by all parties that this is the best information available for surveys of this type.

Captain Wesley Hull, Associate Director, Office of Oceanography, National Ocean Survey, devoted a major portion of his testimony to analyzing the various methods available to establish a mean high water line and the extensive experience of National Ocean Survey in this respect. Captain Hull, himself, is one of the nation's foremost experts on the subject, having over twenty years of experience. His testimony clearly confirmed the surveying techniques, procedures and equipment utilized by the expert surveyors and their crews in establishing the mean high water line. The methods utilized by these surveyors have been accepted for many years, and the relative accuracy, both horizontally and vertically, of the methodology and equipment utilized was well within the accepted conventional surveying standards.

Mr. George Cole, surveyor for the State of Mississippi, placed tidal gauges equipped with cameras at various locations within the area the subject of this lawsuit. Mr. Cole's gauges C-1, C-2, C-3 and C-4 north of Fish Island, as identified on Exhibit S-174 with overlays, were positioned at the upper reaches of streams and bayous north of Bayou LaCroix. Gauge C-5, as identified on Exhibit S-175 with overlays, was located on a stream flowing into the Jourdan River. As identified on Exhibit S-175 with overlays, C-6 was located at the upper reaches of the original natural channel of Long Gar Bayou, and C-7 and C-8 were located on the upper reaches of the original natural channel of Bayou Enceinte. Mr. Cole located another gauge at the site of the National Ocean Survey gauge 874-8087 on

the Jourdan River at the Kelleher Fish Camp, as identified on Exhibit S-176 with overlays. Gauges C-10 and C-11, as identified on Exhibit S-176 with overlays, were located on a tidal stream just above the Kelleher Fish Camp. Mr. Cole testified that the tide ebbed and flowed at each location. Film from gauges at National Ocean Survey gauge 874-8087, C-4 and C-8 were introduced as Exhibits S-203, S-204 and S-205, respectively. These uncontradicted exhibits graphically showed the ebb and flow of the tide at their respective locations. Charts which were introduced as Exhibits S-181 and S-182 correlated the ebb and flow of the tide at National Ocean Survey gauge 874-8087, C-4 and C-8, with tidal activity at the National Ocean Survey Control Station at Pensacola, Florida and the station at the Bay-Waveland Station at Waveland, Mississippi.

The utilization of photogrammetry facilitates the State of Mississippi in its efforts to map the mean high tide line along those areas adjacent to the submerged lands subjected to the ebb and flow of the tide in the State of Mississippi. The utilization of photogrammetry allows the Bureau of Marine Resources to perform its surveys economically, and such surveys are of great assistance to those individuals adjacent to the properties which are submerged and belong to the State and are held in trust under the Public Trust Doctrine.

Marine Resources maps introduced as Exhibit C-46 do not constitute a claim of ownership as is specifically set forth on the cover of those maps. The overlay to Exhibit C-46 states:

> "It is emphasized that the line depicting the aerial extent of Coastal Wetlands is intended only as a guide to provide supplementary information regarding 'regulated activities' defined in the

> Coastal Wetlands Protection Act and does not depict ownership or property boundaries . . . . Final determination of permitting jurisdiction for any area or activity will be based on field investigation. . . ."

Those maps only deal with the jurisdictional limits of the Bureau of Marine Resources. As testimony clearly indicated, those maps were utilized as guides only for the leasing of the state minerals by the State Mineral Lease Commission since those maps were the best maps available at that time.

CONCLUSIONS OF LAW

1. This is a case to cancel cloud on title to property in Township 8 South, Range 14 West, Hancock County, Mississippi. This Court has jurisdiction over such actions pursuant to Section 11-17-29, Miss. Code Annotated (1972). It is not intended to, nor does it affect, riparian or littoral rights of the boundaries. Neither does it affect the public's right of pescary (fishing) where the tide ebbs and flows.

2. The State of Mississippi was created by an Act of Congress dated March 1, 1817 entitled "An Act to enable the people of the western part of the Mississippi territory to form a constitution and state government, and for the admission of such state into the union, on an equal footing with the original states."

3. At the common law, lands lying between high and low tide were lands of the king, but held by him as trustee in his sovereign capacity for all the people and not by him in a proprietary capacity. When the several states were recognized as free and independent governments by the English nation after the Revolutionary War, the owner-

ship of, and dominion and sovereignty over lands covered by tidewaters, and the fresh waters of the great lakes within the limits of the several states, belonged to the respective states within which they were found, with the consequent right to use or dispose of any portion thereof, when that could be done without impairment of the interest of the public in the waters, subject to the right of Congress to control their navigation for the regulation of commerce. Section 81 of the Constitution of Mississippi was adopted by the Constitutional Convention for the purpose of aligning Mississippi with those states which hold that a state cannot convey in fee such rights to private owners for private purposes. *Money v Wood,* 152 Miss. 17, 118 So. 359 (1928).

4. At the common law, the title to lands under the tidal waters below high water mark belonged to the crown and were held by the king in trust for the use of his subjects. The primary uses were navigation, bathing and fishing. Thus it was held that the title of the king was vested in him for the benefit of the people. This common law doctrine was carried over into the United States, including Mississippi. The State holds title to lands under the tidal navigable water in trust for the people, for the purposes of navigation, fishing, bathing, and similar uses. *Treuting v Bridge and Park Com'n of City of Biloxi,* 199 So.2d 632 (Miss. 1967).

On occasion the Mississippi Legislature has authorized an entity to reclaim submerged lands and to sell and lease them for industrial use on such terms as will best promote and protect the public interest. *Treuting,* (id.).

5. It is well settled that upon the question involved herein, Mississippi adopted the common law as it prevails in England. The rule is announced, in substance, in 3

Kent's Comm. 427, as a principle of the English Law, that the right of soil of owners of land bounded by the sea, and on other navigable waters, where the tide ebbs and flows, extends to the high water mark; that the shore below ordinary high water belongs to the State, as trustee for the public; that in England the crown, and in this country the people, have the absolute proprietary interest in the same as in tide waters; that they belong to the public, except that the proprietors adjoining fresh water rivers own the soil. *State ex rel. Rice v Stewart,* 184 So. 44, 47 (1938).

6. When the revolution which led to the establishment of the United States took place, the people of each state became themselves sovereign and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered under the Constitution. *Martin v The Lessee of Waddell,* 41 U.S. 367, 10 L.Ed. 997 (1842).

7. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. The new states have the same rights, sovereignty, and jurisdiction over them as the original states. *State ex rel. Rice v Stewart,* supra, at 49.

8. When the revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them, subject only to the rights since surrendered by the Constitution. *State ex rel. Rice v Stewart,* supra, at 49.

9. Upon the American Revolution all the proprietary rights of the Crown and Parliament in, and all their domi-

nion over, lands under tidewater vested in the several states. *State ex rel. Rice v Stewart,* supra, at 49.

10. It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tidewaters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf, as the original states possess within their respective borders. *State ex rel. Rice v Stewart,* supra, at 49.

11. It has been held by the Supreme Court of the United States that the title of the riparian owner to the soil beneath navigable waters is a question to be determined by the local law of the state in which the same is situated. The Federal government has not had the power to convey land beneath tide waters within the borders of a state after the admission of such state into the union. *State ex rel. Rice v Stewart,* supra, at 49.

12. The courts in Mississippi have held in the cases of *Martin v O'Brien,* 34 M 21 (1857); *Money v Wood,* 152 M 17, 118 So. 357 (1928); *Rouse v Saucier's Heirs,* 166 M 704, 146 So. 291 (1933) that the State holds the title to the land beneath tide water, as trustee for the people, subject only to the paramount right of the United States to control commerce and navigation.

13. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States but were reserved to the states respectively. The new states have the same rights, sovereignty and jurisdiction over the lands under navigable waters as the original states. *Pollard's Lessee v Hagan,* 44 U.S. (3 How.) 230 (1845).

13. It is the settled law of this country that the owner-

ship of and dominion and sovereignty over lands covered by tidewaters, within the limits of the several states, belong to the respective states within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters. *The Illinois Central Railroad Company v State of Illinois,* 146 U.S. 435 (1892).

15. Each state has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy and it is apparent that the United States Supreme Court has clearly recognized that the individual states have complete sovereignty, jurisdiction and control over their tidelands, subject only to the paramount right of the United States to control commerce and navigation between the several states or between the United States and other nations. *Shively v Bowlby,* 152 U.S. 1, 38 L.Ed. 341 (1892).

16. The State owns in fee simple all lands that are flowed by the tide up to the high water line or mark. For the purposes of determining State-owned tidelands, the "high-water line or mark" is the line formed by the intersection of the tidal plane of the mean high tide with the shore. *O'Neil v State Highway Department,* 50 N.J. 307, 235 A.2d 9 (1967).

17. Tideland extends to the high water mark. This does not mean a physical mark made upon the ground by the waters. It means the line of high water as determined by the course of the tides. By the common law, the shore is confined to the flux and reflux of the sea at ordinary tides. It is the land over which the the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always in-

tended where the common law prevails. In order to include the lands thus covered by the ebb and flow of the tides, it is necessary to take the mean high tide line, which is neither the spring tide nor the neap tide, but a mean of all the high tides. Mean high water at any place is the average height of all the high waters at a particular place over a considerable period of time. In order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, an average of 18.6 years (the epoch then in effect) should be determined as near as possible. *Borax Consolidated Ltd. v Los Angeles,* 296 U.S. 15 (1935). It is generally recognized by the courts that the National Ocean Survey is the authority in this area and the data compiled by that organization is the proper data for a determination of the elevation of the tidal plane or where the tidelands meet the uplands. *O'Neill v State Highway Department,* 50 N.J. 307, 235 A.2d 1, 11-12 (1967); Maloney and Ausness, *Coastal Boundaries,* 53 N.C. Law Rev. 185, 194, 202-206 (1974).

19. It is settled in this country that title to the tidelands became vested in the individual states upon their admission into the Union to be governed and controlled according to the laws of each state wherein the tidelands are located. The soils under tidewaters within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original states possessed. *Borax Consolidated Ltd. v Los Angeles,* supra.

20. Upon the admission of the States into the Union the property between the high tide meander line and the same line on the opposite side of a tide water stream became vested in Mississippi as trustee. This title of the State is

held for purposes chief among which is that of commerce and navigation. For purposes of navigation the title of the State is subservient to such regulations as may be constitutionally made by the national government. Neither the State nor the federal government can validly convey title in fee simple to an area such as above mentioned to private owners for private purposes. *Rouse v. Saucier's Heirs,* supra, at 292. It should be noted that the property the subject of the *Rouse* case is located on the Wolfe River near the Bay of St. Louis and is not too distant from the property the subject of this lawsuit.

21. The Public Trust Doctrine in Mississippi has always held that the State of Mississippi is the absolute owner of the soil and of the minerals therein contained and in the beds of all its shores, arms and inlets of the sea wherever the tide ebbs and flows, as trustee for the people of the state; and, as trustee, cannot convey the title to the land beneath such waters below the mean high water mark in fee simple.

22. The shores of the sea below high water mark belong to the State as trustee for the public and may, by grant, become private property, or the subject of an exclusive private right; and the right of the owners of the land bounded by the sea extends no further than to high water mark. *Martin v. O'Brien,* supra.

23. The State of Mississippi is the absolute owner of the title of the soil, and of the minerals therein contained, in the beds of all of its shores, arms and inlets of the sea, wherever the tide ebbs and flows, as trustee for the people of the State, and subject only to the paramount right of the United States to control commerce and navigation, with the consequent right to use or dispose of any portion thereof, when that can be done without impairment of the interest of the public in the waters, subject to the para-

mount right above mentioned, and not inconsistent with Section 81 of the Constitution of the State of Mississippi. *State ex rel. Rice v Stewart,* supra, at 50.

24. Any deed issued by an official of the State of Mississippi, where that official had no authority of law to convey property in question, is void and the individual exercising the authority entirely lacked the power to do so. *Huber v Freret,* 138 Miss. 238, 103 So. 3 (1925).

25. Since the *Treuting* case, supra, was an exception to the general rule which prohibits the sale by a trustee to anyone for private purpose, the case was restricted in its terms to the circumstances there existing which arose from special legislation directed to a particular area. The sale was valid only because the public purpose resulted which was clearly paramount to the public interest. *International Paper Company of Moss Point v Mississippi State Highway Department,* 271 So.2d 399 (Miss. 1972).

26. The judicial department is without power to grant title to trust property to private individuals because tide lands may only be disposed of as authorized by the Legislature within the narrow confines of the holding in *Treuting v Bridge and Park Com'n of City of Biloxi,* supra. Possession, absent such authority, did not ripen into title. *State of Mississippi, et al. v Hanson Properties, Inc.,* 371 So.2d 871 (1979).

The former decisions of the Mississippi Supreme Court as to the ownership of the soil beneath tide waters is in accord with the decisions of courts in this country where the common law prevails. *State ex rel: Rice v Stewart,* supra, at 49.

27. The assessment and payment of taxes on the land the subject of the lawsuit for a period in excess of a half

century does not estop the State from contending that its patents, as they concern any of the property below the mean high water line, are invalid. *International Paper Company of Moss Point v Mississippi State Highway Department,* supra, at 400.

28. The change in characteristics of land during the passage of time did not displace the trust imposed upon the State for the public. *International Paper Company of Moss Point v Mississippi State Highway Department,* supra, at 399.

29. Land may be legally, although not physically, under water, as where it was formerly under water and has been filled in by some person or persons without authority. *Weinberger v Passaic,* 86 A. 59, 84 N.J. Law 149 (1913).

30. Since land below the mean high water mark belongs to the State in its capacity as trustee under the Public Trust Doctrine, to allow the adjacent owner to reclaim this land would be tantamount to allowing him to take state land. *Board of Trustees of the Internal Improvement Trust Fund v Medeira Beach Nominee, Inc.,* 272 So.2d 209, 212 (Fla. Dist. App. 1973).

31. A riparian owner cannot obtain title to submerged lands by filling. *Barney v Keokuk,* 94 U.S. 324 (1876); *United States v Turner,* 175 F.2d 644 (5th Cir.), cert. den. 388 U.S. 851 (1949).

32. Private interests cannot create "fast land" from waterbottoms which are subject to the public right of navigation. *Oyster Co. v Briggs,* 229 U.S. 82, 57 L.Ed. 1083, 33 S.Ct. 679 (1913).

33. If a volume or expanse of navigable water be increased artificially, the public right is correspondingly increased and the title will vest in the state by dedication. *Village of Pewaukee v Savoy,* 79 N.W. 436 (1899).

34. Mississippi courts have long recognized a distinction between fresh water streams and tidelands relative to ownership of submerged lands. Riparian owners of fresh water streams, whether navigable or not, own to the center of the fresh water stream. With respect to those submerged lands subject to the ebb and flow of the tide, the State of Mississippi owns those lands and holds them in trust for all the people, wherever the tide ebbs and flows and regardless of actual navigability. *State ex rel. Rice v Stewart,* 185 So. 247 (1939).

A decree shall be submitted by the solicitors for the State of Mississippi and Saga Petroleum according to Chancery Rules, confirming title as set forth in the above findings of fact and conclusions of law and defining the interests of the parties.

Costs of this proceeding shall be assessed to the complainants.

The above and foregoing Findings and Ruling of the Court is hereby made a part of the record in this cause in accordance with the rules of Chancery practice.

DONE AND ENTERED, this 28th day of April 1982.

/s/ Wm. L. Stewart
WILLIAM L. STEWART, Chancellor

[Metes and bounds descriptions of the properties involved, attached to these findings and ruling, as well a plat of certain properties, have been omitted]

IN THE
CHANCERY COURT
OF HANCOCK COUNTY, MISSISSIPPI

CINQUE BAMBINI PARTNERSHIP	COMPLAINANTS
VS.	CAUSE NO. 14,178
STATE OF MISSISSIPPI, ET AL.	DEFENDANTS

FINAL JUDGMENT AND DECREE

This cause having come on to be heard on Bill of Complaint to Quiet and Confirm Title filed herein by the Complainants and Answers thereto by separate Defendants, Cross Bill of Defendant State of Mississippi, and Motion to Dismiss or Abate the Cross Bill, and all parties being before the Court after proper service of process and upon extensive oral and documentary evidence being duly heard in open Court at the trial of this cause, said trial lasting approximately sixteen (16) days, and the Court having heard and considered all the evidence, arguments, briefs and proposed findings of fact and conclusions of law submitted by the respective parties through counsel, the Court being fully advised in the premises and thereafter having filed its FINDINGS AND RULING OF THE COURT, which includes the CONCLUSIONS OF LAW and Findings of Fact, and based on said FINDINGS AND RULINGS OF THE COURT;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court having heretofore filed its FINDINGS AND RULING OF THE COURT, which includes the CONCLUSIONS OF LAW and Findings of Fact and the Opinion of the Court in this matter pursuant to the

statute, the same is hereby annexed to this decree in its entirety and is incorporated in its entirety as a part of this decree including all addendums appurtenant thereto and is made a part of this decree as though actually embraced herein in its entirety.

2. Complainant, Cinque Bambini Partnership, is the owner of the surface and an undivided one-half (½) mineral interest in those lands described as being vested in the Cinque Bambini Partnership in the FINDINGS AND RULING OF THE COURT and CONCLUSIONS OF LAW which is attached hereto and made a part hereof for all purposes, subject to the oil, gas and mineral leases, easements, right-of-ways, and pooling declarations reflected by public records;

3. Complainant, Harry B. Kelleher, is the owner of the surface and an undivided one-half (½) mineral interest in those lands described as being vested in Harry B. Kelleher in the FINDINGS AND RULING OF THE COURT and CONCLUSIONS OF LAW, which is attached hereto and made a part hereof for all purposes, subject to the oil, gas and mineral leases, easements, right-of-ways, and pooling declarations reflected by public records;

4. Complainants, Carroll W. Allen, Jr. and Lydia Carroll Hamilton Allen, each own and undivided one-fourth (¼) mineral interest in those lands described as being vested in Carroll W. Allen, Jr. and Lydia Carroll Hamilton Allen in the FINDINGS AND RULING OF THE COURT and CONCLUSION OF LAW, which is attached hereto and made a part hereof for all purposes, subject to the oil, gas and mineral leases, easements, right-of ways, and pooling declarations reflected by public records;

5. The Mississippi Power Company is the owner of the surface interest described in the FINDINGS AND RULING OF THE COURT and CONCLUSIONS OF LAW which is attached hereto and made a part hereof for all purposes;

6. Defendant, State of Mississippi, is vested with title to those lands below the mean high tide line and subject to the ebb and flow of the tide described as being vested in the State of Mississippi in the FINDINGS AND RULING OF THE COURT and CONCLUSIONS OF LAW which is attached hereto and made a part hereof for all purposes, subject to oil, gas and mineral leases in favor of Saga Petroleum U.S. Inc. and assignments thereof, and pooling declarations, all as reflected by public records;

7. The Cross Bill of the Defendant, State of Mississippi, is hereby dismissed for the reasons set forth in the FINDINGS AND RULING OF THE COURT and CONCLUSIONS OF LAW.

8. The interests of the respective parties, as declared and set forth in this FINAL JUDGMENT AND DECREE, are herby forever quieted and confirmed against any and all claims or demands by any persons and all persons are hereby enjoined and restrained from asserting any claim, in anywise, contrary to the respective interests herein specifically confirmed and set forth as being vested in the parties hereto.

9.The Court in a previous Order of Continuance granted in this cause on the 18th day of March, 1981, ordered that "the lessee oil and gas companies which are now escrowing funds owed to the royalty owners for oil and/or gas production from the subject lands pay from and after February 20, 1981 interest at the highest rate available at a

federally insured institution until the Court enters its final decree herein"; and that "the actual rate of interest to be paid shall be determined at the appropriate time by order of the Court either by agreement of the affected parties or after notice to all parties and a hearing thereon"; and that "such companies shall then pay the interest along with the principal in accordance with the Court's decree". The Court now determines that the aforegoing Order shall remain in full force and effect and that division of said money and the interest due thereon is a matter of accounting only and will be determined by this Court at such time and in such manner as may be agreed to by the parties with the approval of the Court.

10. A copy of this FINAL JUDGMENT AND DECREE, together with the Opinion of the Court and its FINDINGS AND RULING OF THE COURT and CONCLUSIONS OF LAW shall be entered by the Chancery Clerk in the Final Record of Hancock County, Mississippi, and appropriate notation made in the land records wherever applicable as notice to all persons of the ownership of the interests as designated herein.

11. All costs of this proceeding are assessed pro rata among the Complainants, for which let execution issue.

IT IS SO ORDERED, ADJUDGED AND DECREED this 16th day of September, 1982.

William L. Stewart

CHANCELLOR

APPENDIX C

RULE 28.1 LISTING
PHILLIPS PETROLEUM COMPANY DIRECT AND INDIRECT SUBSIDIARIES AND AFFILIATES OWNED LESS THAN 100%*

ALESKA PIPELINE SERVICE COMPANY

ARCTIC LNG TRANSPORTATION COMPANY

CANADA WESTERN CORDAGE COMPANY, LIMITED

CANYON REEF CARRIERS, INC.

CHISHOLM PIPELINE COMPANY

COCHIN REFINERIES LIMITED

COLONIAL PIPELINE COMPANY

DIXIE PIPELINE COMPANY

EAST TEXAS SALT WATER DISPOSAL COMPANY

EXPLORER PIPELINE COMPANY

GREAT YARMOUTH PORT LABOUR COMPANY LIMITED

HEAT TRANSFER RESEARCH, INC.

IRANIAN MARINE INTERNATIONAL OIL COMPANY – IMINOCO

KENAI LNG CORPORATION

LONG BEACH OIL DEVELOPMENT COMPANY

MULTINATIONAL GAS AND PETROCHEMICAL SERVICES LIMITED

NORLAND GMBH FUR GRUNDBESITZ UND INDUSTRIEANLAGEN

NORPIPE A.S

NORPIPE PETROLEUM UK LIMITED

NORSEA GAS A/S

NORSEA GAS GMBH

NORSEA PIPELINE LIMITED

OIL INSURANCE LIMITED (NEW)

PAPAGO CHEMICALS, INC.

PHILLIPS CARBON BLACK COMPANY (PROPRIETARY) LIMITED

PHILLIPS CARBON BLACK ITALIANA S.P.A.

PHILLIPS CARBON BLACK LIMITED

PHILLIPS EXTRUDED PRODUCTS – LES PRODUITS EXTRUDES PHILLIPS

PHILLIPS PETROLEUM CHEMICALS

PHILLIPS PETROLEUM INTERNATIONAL ANDINA, S.A.

PHILLIPS PETROLEUM INTERNATIONAL S.P.A.

PHILLIPS PETROLEUM SINGAPORE CHEMICALS (PRIVATE) LIMITED

PHILLIPS PETROLEUM TANKER MANAGEMENT, LIMITED

PHILLIPS PETROLEUM TORAY INC.

PHILLIPS-IMPERIAL PETROLEUM LIMITED

POLAR LNG SHIPPING CORPORATION

RENOLIT – HAUS GMBH

SOLAR GAS, INC.

SPODCO LIMITED

SPODCO-USA, INC.

THE SALK INSTITUTE BIOTECHNOLOGY/
INDUSTRIAL ASSOCIATES INC.

VENEZOIL, C.A.

WALTON INSURANCE LIMITED

WESTERN DESERT OPERATING PETROLEUM
COMPANY (WEPCO)

WHITE RIVER SHALE OIL CORPORATION

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*Does not include companies required to issue one or more shares to directors or officers of Phillips Petroleum Company.